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REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE

FOR THE YEAR 1900

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STATE OF THE LANDS UNDER THE ACT OF MARCH 3, 1879

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1923.

ORIGINAL.

IN THE MATTER OF SKINNER & EDDY CORPORATION,
Petitioner.

Motion for Leave to File Petition for Writ of Mandamus; or, in the Alternative, for a Writ of Prohibition.

And now comes Skinner & Eddy Corporation, by its attorneys, and moves for leave to file the petition hereto annexed for a writ of mandamus, or in the alternative, for a writ of prohibition, and that a rule be entered and issued directing the Honorable the Chief Justice and the Associate Judges of the United States Court of Claims to show cause why a writ of mandamus, or, in the alternative, a writ of prohibition, should not issue against them in accordance with the prayers of the said petitioner and why said petitioner should not have such other and further relief in the premises as may be just and meet.

LOUIS TITUS,
J. BARRETT CARTER,
LIVINGSTON B. STEDMAN,
GEORGE DONWORTH,
Attorneys for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES.

In the Matter of SKINNER & EDDY CORPORATION,
Petitioner.

Original.

*To the Honorable the Chief Justice and to the
Associate Justices of the Supreme Court
of the United States:*

The petition of Skinner & Eddy Corporation, a corporation of the State of Washington, for a writ of mandamus, or, in the alternative, for a writ of prohibition, directed to the Honorable the United States Court of Claims, requiring that court:

To restore to full force and effect an order of dismissal made on April 30, 1923, in the case of Skinner and Eddy Corporation *vs.* United States, 199-A, which order of dismissal was made on the motion of the petitioner here, who was the plaintiff in that case, and further requiring said court to set aside an order made November 28, 1923, vacating said order of dismissal of April 30, 1923, and reinstating said cause for the purpose of enabling the United States to file a counter-claim against petitioner in the sum of \$9,-275,148.03, and further requiring said court to desist from the further attempted exercise of jurisdiction in said case.

Said reinstatement was made without the consent and against the objection of petitioner, and said counter-claim was allowed to be filed after petitioner

had ceased to be an actor in said court, and notwithstanding the fact that after the dismissal of said case and before its purported reinstatement, petitioner had brought suit (now still pending) against the United States Shipping Board Emergency Fleet Corporation in another court for a large part of the items claimed in the petition in said case, as grounds of recovery against the United States, the pendency of which later suit prevents petitioner from prosecuting said case in the Court of Claims. (Judicial Code, Section 154; 36 Stat. L. 1138.)

The effect of the said action of the Court of Claims is to require petitioner (a) to remain in said court as to a cause of action which it has dismissed, and which it is barred from prosecuting, and (b) to defend and litigate in the Court of Claims an alleged affirmative cause of action in favor of the United States, as to which the Constitution of the United States guarantees to petitioner a right to trial by jury:

Said petitioner respectfully shows:

I.

On June 15, 1921, your petitioner, Skinner and Eddy Corporation, began suit against the United States in the United States Court of Claims by its petition, in due form, filed in said court on said date. A full copy of said petition in the United States Court of Claims is filed and presented as an exhibit to this present petition, the same being separately bound, and entitled, "Petitioner's Exhibit D-Volume I."

In said petition in the United States Court of Claims, your petitioner alleged that by reason of certain contracts made between said petitioner and the United States Shipping Board Emergency Fleet Cor-

poration, (mentioned in the petition as representing the United States), said petitioner became entitled to receive and recover from the United States the sum of \$24,167,389.55, less credits and offsets specified in said petition in the amount of \$6,673,900.58, leaving a balance due petitioner, exclusive of all just credits and offsets of \$17,493,488.97, for which last-named sum petitioner prayed judgment against the United States. The nature and character of the items making up the said amounts so sued for are more particularly set forth in paragraph XI of the present petition.

II.

Thereafter, to wit, on April 11, 1923, and before any evidence had been taken or any proceedings had in said case, except the filing of a general traverse, your petitioner duly filed in the Office of the Clerk of said Court of Claims its motion in due form to dismiss said suit without prejudice, a copy of said motion appearing at page 4 of Volume II of Exhibit "D" to this petition. At the time of filing said motion, namely, April 11, 1923, your petitioner also presented to the Clerk of said Court, with a request for the filing thereof, a præcipe for dismissal, entitled in said Court and cause and reading as follows:

"Dismissal of Action. The above entitled action is hereby dismissed and the Clerk of said Court is instructed to enter dismissal of record. J. Barrett Carter, attorney for petitioner. Louis Titus of Counsel."

Said præcipe does not appear in the copy of the record of said cause, except in the affidavit of Louis Titus filed therein (see page 37 of Volume II of Ex-

hibit D), for the reason that the Clerk of said Court of Claims refused to enter the same as filed in said Court.

III.

At the time of the filing with the Clerk of said Court of said motion to dismiss and the tender of said *præcipe* for dismissal to the Clerk of said Court for filing, the United States of America, the defendant in said cause, had not made or filed in said cause any answer, setoff, counter-claim cross petition, or other pleading. Under Rule 34 of said Court of Claims, the Clerk of said Court on August 15, 1921, (being at the expiration of sixty days from the date of the filing of said petition), had entered in said cause a general traverse of the petition on behalf of said defendant. No other pleading or paper of any kind was filed in said cause by the defendant, the United States of America, prior to the filing of claimant's motion to dismiss and *præcipe* for dismissal on April 11, 1923.

IV.

On April 12, 1923, said defendant, the United States, having received service of claimant's motion to dismiss, filed in said Court of Claims its motion "for an order granting to it the right to withdraw its general traverse heretofore filed in this cause and to file its answer and cross bill," a copy of which appears at page 7 of Volume II of Exhibit D to this petition. Thereupon in due course, an order of said Court of Claims was made, setting down for hearing for April 23, 1923, claimant's motion to dismiss and defendant's motion to withdraw the general traverse, and for a "grant of the right" to file answer and cross bill.

V.

On said April 23, 1923, the said motions were argued and submitted in said Court of Claims and on April 30, 1923, said Court of Claims duly made and entered its order, dismissing said cause, said order being in the words following to wit:

“It is ordered by the Court, on plaintiff’s motion therefor, that the plaintiff’s petition be, and the same is, dismissed.”

VI.

Notwithstanding said petitioner’s election and motion to dismiss said cause and notwithstanding that the said cause was in fact dismissed by said Court of Claims on April 30, 1923, said Court of Claims is now attempting and proceeding to entertain jurisdiction of said cause and to permit said defendant, the United States, to file in said cause and to wage against petitioner therein its alleged counter-claim praying for judgment against petitioner in the sum of \$9,275,148.03; and said Court has declared its intention to allow said counter-claim to be heard and determined and also to require petitioner to wage in said Court of Claims the matters and things alleged in said petitioner’s original petition in said cause; all to the manifest wrong and injury of said petitioner and its great and irreparable loss and damage. In announcing its determination to hear and determine said petition and said alleged counter-claim, said Court of Claims on November 28, 1923, made and filed its opinion and order in said cause, (appearing in full at page 51 of Volume II of Exhibit D to this petition) in which opinion and order it is concluded and directed as follows:

“That order” (meaning the order of April 30, 1923, dismissing said cause as hereinbefore set out) “will be vacated and another order entered overruling the motion to dismiss, and allowing the Government to file its counter-claim”

VII.

In dismissing said cause, said petitioner had no thought or intention to forestall any setoff, counter-claim, or other cross petition by the United States. The reasons actuating said petitioner in dismissing said cause were the following:

1. Said petitioner was advised and believed, and is still advised and believes, that it had the right to dismiss said cause of its own motion without assigning any reason whatever.

2. At the time said cause was begun on June 15, 1921, said petitioner was advised and believed that the proper forum and method for asserting claims arising out of contracts with the United States Shipping Board Emergency Fleet Corporation, was in the Court of Claims by suit against the United States. It was not until May 1, 1922, when the Supreme Court of the United States decided the Sloan and Astoria cases against the United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549, that petitioner could know authoritatively that suits on such contracts could be maintained against the Fleet Corporation. The decision in the Sloan and Astoria cases was a most material fact, occurring after the commencement of said cause in the Court of Claims, and in view of the doubt and uncertainty theretofore prevailing, petitioner should not be held to a course of action adopted at a time when serious doubt prevailed on said subject among lawyers and judges. The decisions of the

lower courts reviewed and reversed in the Sloan and Astoria cases were to the effect that the contractor's remedy was by suit in the Court of Claims against the United States.

3. It was not until April 9, 1923 (when the Supreme Court of the United States decided the case of Russell Motor Car Co. *vs.* the United States, 261 U. S. 514), that petitioner could authoritatively know that the Act of June 15, 1917, (40 Stat. L. 183) relating to the cancellation of contracts and making just compensation therefor, applied to contracts of the United States, and further that the cancellation of such contracts cut off and defeated the claims of contractors for the profits which they would have realized if they had been permitted to fulfill such contracts, and that the remedy for such cancellation was a suit for just compensation as provided in said statute. The importance of this consideration is seen in the fact that the greater part of the amount for which judgment is prayed by petitioner in the Court of Claims is for profits petitioner would have made had the contracts been completed. There are also other items which, in a suit against the United States, should properly be claimed as "just compensation" for the cancellation of said contracts, a total of which items, together with the claim for anticipated profits, represents more than the total amount for which judgment was demanded by petitioner in the said suit in the Court of Claims. As it is settled that petitioner cannot recover anticipated profits, and as it cannot recover just compensation in this suit because prematurely filed, as will hereinafter appear, it follows that petitioner cannot recover any affirmative judgment whatever in said action.

4. Two months before petitioner's suit was begun in the Court of Claims, namely, on April 4, 1921, that court had filed its decision in the case of *College Point Boat Corporation v. The United States*, (see Exhibit A to this petition) in which that court held that upon cancellation of a contract between the Boat Corporation and the Navy Department (the contract having been made on October 25, 1918, and cancellation having been made by the Navy Department on February 26, 1919), the contractor was entitled to recover anticipated profits, the cancellation being treated like any other breach of contract. This decision was relied upon by petitioner in filing said suit in the Court of Claims on June 15, 1921, because it held (a) that a cancellation of such a contract was a breach, and (b) that the United States was liable in damages for such breach. However, the decision of the Court of Claims in the *College Point* case was not allowed by that Court to stand, but was later entirely withdrawn and does not appear in the published reports of the Court of Claims.

It was not until January 9, 1922, as petitioner is informed and believes, when the Court of Claims decided the case of *Meyer Scale Company v. United States*, 57 Ct. Cls. 26, that that court announced the holding that there could be no recovery of anticipated profits in the case of cancelled contracts. In that case the Court of Claims said, as reported in 57 Ct. Cls. at page 51:

"The question here decided was presented in *College Point Boat Corporation v. United States*, decided April 4, 1921, and it is now said that although there presented by the defendant, we rendered judgment for the plaintiff without dignifying the point by discussing it. Under the facts

of that case we found it possible to determine the rights of the parties as we saw them without considering or deciding this question, and as to it we cannot consent to be committed by that case."

And, on June 26, 1922, in *Russell Motor Car Co. vs. United States*, 57 Ct. Cls. 464, the Court of Claims said at page 496:

"It is noted that plaintiff requests reconsideration of our conclusions in the *Meyer Scale case* and a following in this case of the holding in *College Point Boat Corporation*, theretofore decided. Counsel was probably not aware of the fact that the conclusions and judgment in the last named case had been set aside and that the rule of the *Meyer Scale case*, restated here, is the rule of this Court."

See footnote published in 57 Ct. Cls. at page 51, regarding the setting aside of the decision in the *College Point Boat case*.

In bringing its said suit in the Court of Claims said petitioner was induced so to do by the holding of the Court of Claims in said *College Point case* which was not set aside until more than six months after petitioner began said suit.

5. As petitioner is now advised and believes, its said suit in the Court of Claims, if continued and prosecuted therein, will necessarily fail in its entirety for the reason that anticipated profits cannot be recovered and as to just compensation the suit is prematurely brought. This is the ground particularly mentioned by petitioner in its motion to dismiss as presented to the Court of Claims. Under the Act of June 15, 1917, 40 Stat. L. 183, suit for just compensation against the United States can only be maintained *after*

an ascertainment of the just compensation has been made by the President. When such compensation has been determined, the claimant may accept 75 per cent of the amount of the award and sue for such further sum as he claims to be just. The award of the proper governmental agency is, however, a condition precedent to the suit.

The Act of June 5, 1920, 41 Stat. L. 989, provides that the Shipping Board shall be the agency to determine the just compensation in the case of contracts made by the Fleet Corporation. Petitioner's petition in the Court of Claims does not allege any filing of the claim with the Shipping Board or any action of that Board thereon. In fact, it appears by the affidavits filed in the Court of Claims that petitioner's claim was filed with the Shipping Board in March, 1922 (long after petitioner's suit was begun in the Court of Claims), and no award of just compensation for the cancellation of petitioner's contracts was made by that Board until February 14, 1923. (See affidavit of Louis Titus, page 30 of Volume II of Exhibit D to this petition.) It is obvious that the Court of Claims cannot in the action begun by petitioner on June 15, 1921, award just compensation for the cancellation of petitioner's contracts, when the award of compensation by the Shipping Board took place after the commencement of the suit in the Court of Claims. No cause of action for such just compensation existed when petitioner began suit on June 15, 1921.

6. Though petitioner's general claim, substantially as set forth in its petition in its suit begun thereafter against the United States in the Court of Claims, was presented in unverified form to the Auditor for the

State and other Departments on December 28, 1920, petitioner in that claim was seeking anticipated profits as well as payment for work done and materials furnished, and was not asking just compensation for the cancellation of contracts, and no action was taken on said claim up to the time that petitioner began suit in the Court of Claims or thereafter. The facts are set forth in the affidavit of Louis Titus, page 30 of Volume II of Exhibit D to this petition. Said presentation to the Auditor could have no effect upon the right to maintain said suit in the Court of Claims for just compensation, since the determination of the amount of just compensation by the Shipping Board was by the Statutes of June 5, 1920 (41 Stat. L 989) and June 15, 1917 (40 Stat. L 183), made a condition precedent to suit.

7. As to all items claimed upon in the Court of Claims, except such items as should properly be included in a claim for just compensation, it follows from the decision in the Astoria case, 261 U. S. 514, that the proper defendant is the United States Shipping Board Emergency Fleet Corporation, in a suit brought in some court of general jurisdiction where said corporation may be found, and petitioner has the right (which it has now exercised) to bring suit for said items against said Fleet Corporation, the defendant which the Supreme Court holds is liable and suable for breach of such contracts as those made by it with petitioner, and petitioner cannot be compelled to take the unnecessary hazard of trying to hold the United States therefor.

VIII.

Petitioner's suit in the Court of Claims having been dismissed by order of that court on April 30, 1923, petitioner on the following day, namely, on May 1, 1923, filed suit against the United States Shipping Board Emergency Fleet Corporation in the State Court of Washington, at Seattle, Washington, for many of the items for which suit had been brought in the Court of Claims, namely, for all of said items except the claim for anticipated profits,—the amount claimed in said suit at Seattle being \$9,129,401.14. On the same day that suit was filed in the State Court at Seattle, service was had on the Fleet Corporation in accordance with the provisions of the State statute, and on May 7, 1923, said Fleet Corporation appeared specially in said State Court and filed its petition to remove said cause to the United States District Court for the Western District of Washington, Northern Division, holding its terms at Seattle, and an order of removal was made accordingly and the cause transferred to the United States District Court.

On June 29, 1923, said Fleet Corporation, claiming to appear specially in said cause, moved the Court to quash and set aside the service of summons in said cause on the ground that said Fleet Corporation was not engaged in business in the State of Washington and could not be sued there. Said motion to quash and set aside the service was duly heard, and on November 23, 1923, the presiding justice made and filed his decision and order, denying the motion of the Fleet Corporation to quash said service and holding said service to be valid. A certified copy of said decision and order of the District Judge are attached to this petition and

made a part hereof as Exhibits B and C. The said cause is still pending in said United States District Court for the Western District of Washington, Northern Division, and the defendant Fleet Corporation is now required to answer said suit.

At the time action was brought against the Fleet Corporation in the State Court at Seattle, there was no action pending in any court for or against said petitioner on account of any of the matters growing out of any of said contracts or claims.

IX.

The proceedings of said Court of Claims, subsequent to its dismissal of said cause on April 30, 1923, and which have led up to the attempt on the part of said court again to exercise jurisdiction thereof and to require said petitioner's attendance in said court and cause, are as follows, as petitioner is advised by its counsel in said cause, and as appears from a certified copy of the proceedings in said court filed herewith as Exhibit D (separately bound in two volumes) to the present petition, namely:

On June 9, 1923 (being 40 days after the dismissal of said cause in said Court of Claims and being thirty-nine days after said petitioner's said suit against the Fleet Corporation had been begun in Seattle, and being 33 days after said Fleet Corporation had filed in the State Court at Seattle its petition for removal of said cause to the United States District Court), the United States filed in said Court of Claims a written petition entitled, "Petition by the United States for reargument of claimant's motion to dismiss the petition, and for leave to file an answer alleging a set-off and coun-

ter claim and to prosecute the same," which said petition is part of the record of the said Court of Claims, and is found in full in Volume II of Exhibit D to this petition, at page 7.

The prayer of said petition is "that the said order of April 30, 1923, may be vacated; that the claimant's motion to dismiss without prejudice or otherwise be denied, and that the set-off and counter-claim of the United States be filed and prosecuted, and that the United States may have such further order, judgment, decree or relief as it may be entitled to."

In said petition of the United States for reargument, it is alleged in paragraphs VIII, IX and X thereof (see Volume II of Exhibit D to this petition at pages 13-14), that subsequently to said order of dismissal, said petitioner, Skinner and Eddy Corporation, instead of filing another suit in said Court of Claims "has brought an action at law in a State Court of the State of Washington, against the United States Shipping Board Emergency Fleet Corporation, upon the same cause of action as is alleged in its claim heretofore filed in this court." It is further alleged that the Fleet Corporation has appeared specially in the State Court and has caused the action to be removed to the District Court of the United States, and that the Fleet Corporation is about to make a motion "to dismiss the said action for lack of jurisdiction over the defendant, upon the ground that said defendant, Fleet Corporation, was not at the time of the institution of said action doing business within the State of Washington."

It is further alleged by the United States in said petition for rehearing that "substantially all documents and all witnesses and evidence required for the

presentation and prosecution of the counter-claim of the United States heretofore attempted to be asserted in this cause are in Washington, D. C., and that if the Fleet Corporation should attempt in said action to set up the said counter-claim and to establish the same, vast expenses would be incurred in sending witnesses and documentary evidence to the State of Washington." Said petitioner denies both the truth and the relevency of said last quoted allegation. It is further alleged that the United States has the right to prosecute said counter-claim in said Court of Claims and that said right exists regardless of the bringing of an action at law by the claimant in another court.

In support of said petition by the United States affidavits and briefs were filed, and counter affidavits and briefs were filed by said petitioner, Skinner and Eddy Corporation, appearing specially in opposition to said petition for reinstatement.

No cross-complaint, counter-claim, or setoff on the part of the United States was filed in said Court of Claims or presented to said Court at any time before the dismissal of said cause on April 30, 1923. In fact, neither the counter-claim now urged by the United States, nor any other counter-claim, was either filed or exhibited to said Court by the defendant until June 9, 1923 (forty days after the dismissal of said cause), when for the first time a counter-claim (stating the items as afterwards filed herein December 1, 1923), was attached as an exhibit to the affidavit of W. L. Cole, filed in said cause on June 9, 1923. The first time that said counter-claim was filed was on December 1, 1923.

As a result of said argument and briefs, said Court of Claims on October 22, 1923, entered its order over-

ruling and denying the petition and motion of said defendant, the United States, to vacate said order of dismissal made April 30, 1923, and overruling and denying said defendant's motion for leave to file and prosecute its alleged setoff and counter-claim. Thereafter, to wit, on October 23, 1923, said Court of Claims entered an order on its own motion, directing that the order of October 22, 1923, overruling said defendant's motion and petition, be vacated and that said motion be set for further hearing before the Court on Monday, October 29, 1923. Said matter was thereafter continued to November 12, 1923, on which date it was argued and submitted.

On November 28, 1923, said Court of Claims filed its written opinion and decision, directing that the order of dismissal entered April 30, 1923, be vacated "and another order entered overruling the motion to dismiss and allowing the Government to file its counter-claim." Said opinion and order of the Court of Claims is found in Volume II of Exhibit D to this petition, at page 51.

X.

For the information of the Court, we give the following chronological table of events, underscoring the dates on which any step or proceeding took place in petitioner's said cause in the Court of Claims:

June 15, 1917—	Act of Congress approved, authorizing the President or his authorized agents to cancel contracts and requiring just compensation to be made. 40 Stat, L, 183.
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June 5, 1920—

Act of Congress, known as the "Jones Act," approved, granting certain powers to the Shipping Board, continuing the existence of the Fleet Corporation, and constituting the Shipping Board the agency to determine just compensation for cancellation of contracts relating to building of ships. 41 Stat. L, 989.

December 28, 1920—

Petitioner files with Auditor for the State and other Departments unverified statement of its claim, claiming \$24,247,119.31, less credits of \$6,230,142.60, leaving a net amount claimed in favor of petitioner of \$18,016,976.71, this including anticipated profits, but not mentioning just compensation for cancellation. See Volume II of Exhibit D to this petition, at page 32.

April 4, 1921—

Decision of Court of Claims in College Point Boat case, holding that a contractor can recover anticipated profits on contract made during the war with Navy Department and later cancelled by that Department, the cancellation being an actual breach. Said decision was withdrawn before it was officially reported, but appears in full as Exhibit A to this petition.

June 15, 1921—

Petitioner, Skinner and Eddy, Corporation, files suit in Court of Claims.

N. B.—At this time the holdings of the Courts generally were in favor of the proposition that the Fleet Corporation was not liable for such contracts, but that the remedy was against the United States in the Court of Claims.

August 15, 1921—

Clerk of Court of Claims enters defendant's general traverse, under rule 34 of said court, no plea, answer or counter-claim having been filed.

January 9, 1922—

Decision of Court of Claims in Meyer Scale case, 57 Ct. Cls. 26, holding that anticipated profits cannot be recovered in case of cancelled contracts, and stating that decision in the College Point Boat case has been overruled.

January 16, 1922—

Court of Claims sets aside its decision in College Point Boat case without filing any new opinion. See foot-note published in 57 Ct. Cls. 51.

March 29, 1922—

Petitioner's claim filed in quadruplicate with United States Shipping Board, following the decision of the Court of Claims in the Meyer Scale case. 57 Ct. Cls. 26.

May 1, 1922—

United States Supreme Court decides Sloan and Astoria cases, 258 U. S. 549, holding that contracts of this character, that is, contracts made by the Fleet Corporation "representing the United States," are contracts of the Fleet Corporation and not contracts of the United States.

June 26, 1922—

Court of Claims decides case of Russell Motor Car Co. vs. United States, 57 Ct. Cls. 464, holding that Act of June 15, 1917, concerning the cancellation of contracts, relates to contracts made by the United States in its behalf, and that anticipated profits cannot be recovered. It is there stated that the Court's conclusion and judgment in the College Point Boat case had been set aside. (57 Ct. Cls. 496.)

February 14, 1923—

United States Shipping Board makes order determining just compensation to petitioner for cancellation of contracts to be \$3,130,433.46, but declares that petitioner owes the Fleet Corporation "representing the United States of America," a greater sum and directs that therefore no payment be made to petitioner. See Volume II of Exhibit D to this petition, at pages 11-13.

April 9, 1923—

United States Supreme Court decides Russell Motor Car case (261 U. S. 514), affirming Court of Claims decision in same case and authoritatively holding (a) that the Act of June 15, 1917, authorizing cancellation of contracts, applies to all contracts, including those made by the Government, (b) that there can be no recovery in case of cancellation for anticipated profits, and (c) that the sole remedy of the contractor in case of cancelled contracts is to pursue his remedy for just compensation as defined in the Act of June 15, 1917.

April 11, 1923—

Petitioner, in view of holding of Supreme Court announced two days before in Russell Motor Car case, and in view of the decision of the Supreme Court in the Sloan and Astoria cases and other rulings, files in Court of Claims its motion to dismiss without prejudice its action there pending, and petitioner also leaves with clerk of said Court its praecipe for dismissal of said cause.

April 12, 1923—

Defendant, the United States, moves in Court of Claims for "an order granting to it the right to withdraw its general traverse and to file its answer and cross-bill."

November 28, 1923—Opinion and order filed in Court of Claims vacating order of dismissal made April 30, 1923, and ordering that petitioner's motion to dismiss be overruled and that the Government be allowed to file its counter-claim.

December 1, 1923—Answer and counter-claim of defendant, United States, filed in Court of Claims, pleading payment and *nil debet*, and counter-claiming affirmatively against petitioner for \$9,275,148.03.

N. B.—This is the first appearance of the counter-claim in court, except that it appears as an exhibit to the affidavit of W. L. Cole filed June 9, 1923 (Volume II of Exhibit D to this petition, at page 27). The leave to file the counter-claim was granted seven months after the action was dismissed on petitioner's motion.

XI.

For the information of the Court we give here a résumé of the items alleged and sued for in petitioner's petition filed in the Court of Claims, a copy of which petition, with all exhibits thereto, constitutes Vol. I of Exhibit D to this petition. The petition alleges that petitioner had contracts with the Fleet Corporation (mentioned as "representing the United States"), for the construction of ships, as follows:

Supplemental Contract 10-SC, made February 16, 1918, for six steel vessels (all delivered).

Contract 175-SC, made January 15, 1918, for fourteen steel vessels (all delivered).

Contract 309-SC, made May 27, 1918, for fifteen steel vessels (all delivered).

Contract 324-SC, made June 1, 1918, for 35 steel vessels, of which 22 were delivered, and as to 13 the contract was cancelled.

Contract 447-SC, made July 18, 1918, for 12 steel vessels, as to all of which the contract was cancelled.

The petition also alleges a special contract between petitioner and the Fleet Corporation (mentioned in the petition, but not in the contracts, as "representing the United States"), dated May 11, 1918, regarding the purchase by petitioner from the Fleet Corporation of a shipbuilding plant, known as plant No. 2, formerly owned by the Seattle Construction and Dry Dock Company, and the use of said plant by petitioner for constructing said vessels. The items of the claims alleged in the petition as arising under said contracts are as follows:

Amount expended for betterments, payments to the United States, and carrying charges under con- tract of May 11, 1918, for Plant No. 2	\$1,872,576.37
Anticipated profits on 25 ships con- tracted for but cancelled under contracts S. C. 324 and S. C. 447.	17,303,845.25
Losses on materials purchased for cancelled ships	906,416.26

Advance payments to sub-contractors on cancelled ships.....	332,034.27
Balance due claimant under Contract 309-SC for one of the vessels completed and delivered under this contract	184,500.00
Balance due claimant under Contract 324-SC on six of the vessels completed and delivered under this contract	813,000.00
Accrued bonus allowance on account of advance deliveries on ships...	536,000.00
Accrued bonus allowance on account of advance deliveries on ships...	1,259,600.00
Extra labor costs for holidays, Saturdays, etc.	454,763.55
Overhead expenses during labor strike, stoppage of work being ordered by E. F. C.	336,575.26
Extra freight paid on materials...	33,618.60
Cost of certain alterations	56,698.00
Extra trial tests and work required therefor	8,867.45
Repairs and additions to E. F. C. Steamer FORT WRIGHT	190.28
Repairs and additions to E. F. C. Steamer EGREMONT	136.00
Repairs and additions to E. F. C. Steamer EDGEHILL	16,837.13
Repairs and additions to E. F. C. Steamer WEST MAXIMUS ...	26,946.29
Repairs and additions to E. F. C. Steamer EDGEMONT	24,784.84
Total of Items	<u>\$24,167,389.55</u>
Less credits and offsets stated in petition	6,673,900.58
Amount claimed in petition	<u>\$17,493,488.97</u>

XII.

The counter-claim (which was first exhibited to the Court of Claims as an Exhibit to an affidavit on June 9, 1923, and was first filed in said court on December 1, 1923, pursuant to leave first granted on November 28, 1923), is as follows:

“Further answering the petition and by way of setoff or counter-claim the defendant states that plaintiff is indebted to the defendant in the gross sum of \$9,275,148.03 because of certain transactions in connection with the contracts heretofore referred to; that said sum is made up of the following items, to wit:

Advances on canceled ships.....	\$4,612,500.00
EFC Stores bought by Claimant	623,387.46
Turbines and Spares furnished by EFC	804,440.02
Anchors and Chains furnished by EFC	35,288.26
Sundry Credits to EFC	2,673.90
Repairs of Defective Work.....	9,152.43
Omissions of Equipment	35,263.60
Plant No. 2 Equipment taken by Claimant	146,150.10
Rent of Yard No. 2	2,750,000.00
Bonuses paid in Error	113,800.00
Liquidated Damages	100,000.00
Damages to Derrick	7,500.00
Heney Taxes	6,997.00
Overtime Bonus paid in Error..	27,995.26
Total Offsets.....	\$9,275,148.03

WHEREFORE, the defendant prays judgment for the said sum of \$9,275,148.03, with interest from the date of payment by the defendant.”

And your petitioner avers that all the contracts and transactions involved in said counter-claim are contracts and transactions between your petitioner and said United States Shipping Board Emergency Fleet Corporation.

Further, if said counter-claim is allowed to stand and your petitioner is required to defend against it in a suit in the Court of Claims, petitioner will not be permitted to prosecute in said suit its claim for just compensation even to the extent of the \$3,130,433.46, which the Shipping Board determined on February 14, 1923, to be just compensation to petitioner for the cancellation of said contracts, for the reason that said determination was made after suit had been filed. In said counter-claim, as appears in the items thereof above set forth in this paragraph, no credit or allowance is made to petitioner for said sum of \$3,130,433.46, determined by the Shipping Board to be the just compensation awarded and allowed to petitioner because of the cancellation of said contracts.

XIII.

Your petitioner is advised and believes that on the filing of its motion and praecipe for dismissal of said cause on April 11, 1923 (there being no counter-claim then pending) an absolute right of dismissal appertained to petitioner without any exercise or right of exercise of discretion on the part of said Court of Claims.

Further, if (as petitioner denies) any discretion whatever existed on the part of said Court of Claims to grant or withhold such dismissal, such discretion, when once exercised by the making of the order of dismissal, was final.

Further, all power and jurisdiction of said court to grant to defendant the right to file a cross-complaint or counter-claim against petitioner ceased on petitioner's moving for dismissal of said cause.

Petitioner respectfully further suggests that it is beyond the power and jurisdiction of said Court of Claims to revoke and recall its order of dismissal by reason of a subsequent event, namely, the beginning by said petitioner of a new suit against the United States Shipping Board Emergency Fleet Corporation. As said petitioner, under the decisions of the Supreme Court, had the right to sue said Fleet Corporation on its contracts (being the contracts alleged in the petition in said Court of Claims) it had the right to bring such suit against said Fleet Corporation in any State where it found said Fleet Corporation doing business, including the State of Washington where petitioner resides and where the cause of action arose. For the Court of Claims to revoke its order of dismissal of April 30, 1923, for the reasons advanced by the United States in its petition for rehearing or for any reason here appearing, petitioner respectfully suggests, is not only unjust, but is arbitrary and beyond the powers of said court.

It is further in excess of the jurisdiction of the said Court and unjust to reinstate said cause for the purpose of allowing the United States to wage against said petitioner in said Court of Claims, a counter-claim which the United States or the Fleet Corporation may wage against said petitioner in the ordinary courts of law, and which under the statutes of the United States cannot be waged against one who is not voluntarily an actor in said Court of Claims.

Further, the counter-claim which the United States

is attempting to assert in this cause, as hereinbefore set out, consists of items, all of which are items accruing to said Fleet Corporation, and not to the United States, as follows from the decision of this court in the Sloan and Astoria case, 258 U. S. 514, 549.

Further, said Court of Claims never at any time had jurisdiction of the said cause begun in said Court by petitioner, for the reason that it appears on the face of the petition in said cause that the contracts and transactions therein alleged are contracts and transactions of the Fleet Corporation and not of the United States. This follows from the decision of the Supreme Court in the Astoria case holding the Fleet Corporation to be a private corporation and that its contracts and transactions are the contracts and transactions of that corporation and not those of the United States. The attempt of petitioner (under the mistaken view of the law prevailing at the time the suit was begun in the Court of Claims) cannot, of course, confer on the Court of Claims jurisdiction to determine the liabilities of a private corporation.

Further, said petitioner respectfully suggests that it has a right to wage its cause of action, arising under said shipbuilding contracts, in such forum and against such defendant as said petitioner may be advised is most likely to procure for it an effective remedy, and petitioner cannot be compelled to wage said matters in a suit prematurely brought or in a suit against the United States as a defendant instead of against said Fleet Corporation.

Said petitioner further respectfully suggests that if said contracts were cancelled by the United States, the right to assert a claim for just compensation by reason

thereof can only be asserted in the Court of Claims in a suit commenced *after* an award of just compensation made by the United States Shipping Board, and the opportunity and right of the United States to wage any proper counter-claim that it may desire to wage in said court will accrue when said petitioner begins suit against the United States for said just compensation. Further, should the United States, in advance of the institution of such new suit by petitioner in the Court of Claims, desire to wage affirmatively any claim that it may have against petitioner, it may, of course, do so in the ordinary courts of law.

XIV.

Your petitioner is informed and believes that the said order of the Court of Claims made November 28, 1923 (vacating the order of dismissal made April 30, 1923, and allowing the United States to file and wage in said Court of Claims a counter-claim against said petitioner) is invalid and without jurisdiction and in excess of the jurisdiction of said Court of Claims; and that further proceedings in said Court and cause, without the consent of this petitioner, and against its objection, are and will be without validity and unjust and arbitrary; that the Court of Claims had no power to make said order; that this petitioner cannot appeal from said order; that the effect of said order is to compel said petitioner to prosecute in said Court of Claims a suit prematurely brought, and to compel said petitioner to litigate in said Court a counter-claim, prosecuted by the United States against your petitioner who is not voluntarily in said court and who took

all necessary and proper steps to withdraw itself from the jurisdiction of said court before any assertion or attempted assertion of a counter-claim was made; that said Court of Claims has no jurisdiction of said counter-claim; that the statutes of the United States do not require a plaintiff to remain in said Court, or to respond to any counter-claim therein when he himself is not an actor in said Court; that the further hearing of said cause, either on the petition or on the alleged counter-claim, against the objection of said petitioner, will be in violation of the rights of said petitioner guaranteed to it by the Constitution of the United States and by the Statutes of the United States, and the decisions of this Court, particularly the constitutional provisions and statutes granting the right of trial by jury in civil actions and the decisions of this Court which permit said petitioner to dismiss any action begun by said petitioner, which it considers not likely to secure its full rights, and further, would be in violation of the statute which limits the jurisdiction of the Court of Claims with respect to causes of action in favor of the United States, to counter-claims and setoffs against plaintiffs who are themselves actors in said court; that because of said reinstatement order of November 28, 1923, said petitioner, if said order is upheld, will be required to remain in said Court of Claims when said petitioner is positively prohibited by the statutes of the United States (Judicial Code, Section 154; 36 Stat. L, 138), from prosecuting its said suit therein on account of the pendency of said other suit brought by said petitioner against said Fleet Corporation, and now pending in the United States District Court at Seattle, which suit said petitioner had

the lawful right to begin and has now the lawful right to prosecute; that (as petitioner is informed and believes) one of the purposes of the United States in seeking said reinstatement order is to require this petitioner to dismiss said suit of petitioner against the Fleet Corporation now lawfully pending in the United States District Court at Seattle.

Your petitioner further shows that said Court of Claims is claiming that it has discretion to reinstate said cause, whereas it lost jurisdiction of said cause when it dismissed the same on April 30, 1923; and said Court has no power or jurisdiction in any case to reinstate a cause by reason of subsequent events, as it is now attempting to do at the instance of the representatives of the defendant United States.

Said petitioner is without any remedy or redress against said order in the ordinary course of law, and has no remedy adequate to protect said petitioner against said attempted excess of jurisdiction but by the special intervention of this Court by a writ of mandamus or prohibition directed to said Court of Claims.

If further action of said Court of Claims is not now prevented by peremptory writ and order of this Court, and if petitioner is left to its remedy by appeal after final judgment in said cause, petitioner, as well as the United States, will be put to enormous cost and expense in litigating the numerous items concerned, many of which are greatly complicated, all of which cost and expense will go for naught, and petitioner will also suffer grievous delay and will have to incur serious risk and hazard regarding the proper forum for the assertion of its rights, all of which will amount, as

petitioner is informed and believes, to a denial of justice and will work irreparable injury and damage to petitioner. As will appear by the examination of the petition filed in the Court of Claims, said action involves numerous contracts and an almost infinite number of details in connection with said contracts, and if said action should proceed to trial, it would necessarily involve the examination of a large number of witnesses and the taking of many months of testimony, besides the examination and introduction in evidence of a very large number of documentary exhibits. Substantially all of the witnesses for petitioner reside in the City of Seattle, State of Washington, and substantially all of the documentary evidence is in the office of petitioner in said City of Seattle, where all the work under said contracts was performed or to be performed. That a large part of the evidence that must be adduced in said case is to be found in petitioner's books of accounts, and said books are very voluminous and are all in the office of petitioner in the City of Seattle. The taking of all of said testimony would involve a large amount of labor and expense, all of which would go for naught if petitioner be relegated to its remedy by appeal, and if it should be finally held by this Court that the Court of Claims is without jurisdiction of said cause. Moreover, if a writ of mandamus or prohibition be not granted, petitioner will be compelled to defend against the counter-claim filed by the United States in said cause in said Court of Claims, and will be deprived of the right to a trial by jury of the issues raised by said counter-claim, which right is guaranteed petitioner by the Constitution of the United States.

If petitioner should now be compelled to dismiss its suit now pending in the United States District Court at Seattle, and be compelled to prosecute its claim before the Court of Claims (such dismissal being required in order to comply with Section 154 of the Judicial Code if petitioner remains in the Court of Claims), then before a final hearing could be had in this court on appeal from the Court of Claims, the cause of action of petitioner against said Fleet Corporation now asserted in said suit pending in said United States District Court at Seattle, would be barred by the Statute of Limitations.

WHEREFORE, your petitioner prays that a rule may issue from this Honorable Court directed to the Honorable the Chief Justice and the Associate Judges of the United States Court of Claims requiring them to show cause why a writ of mandamus should not issue commanding the said Chief Justice and Associate Justices of said court and each of them, to restore to full force and effect said order of dismissal made on April 30, 1923, in the case of Skinner & Eddy Corporation *vs.* United States, 199-A and further requiring them to set aside an order made by the said United States Court of Claims on November 28, 1923, vacating said order of dismissal of April 30, 1923, and that they be prohibited from further attempting the exercise of jurisdiction in said cause, and why your petitioner should not have such other and further relief in the premises as may be just and meet.

Your petitioner also prays that, in order to protect your petitioner from irreparable loss while this application is pending, a temporary order issue forthwith requiring said Court of Claims to refrain from

exercising any jurisdiction in said cause while this application is pending in this Court.

And your petitioner will ever pray.

Dated at Seattle, Washington, January 2, 1924.

SKINNER & EDDY CORPORATION,

By

D. E. SKINNER,
Its President.

LOUIS TITUS,
J. BARRETT CARTER,
LIVINGSTON B. STEDMAN,
GEORGE DONWORTH,
Attorneys for Petitioner.

STATE OF WASHINGTON, }
COUNTY OF KING. } ss:

D. E. Skinner being duly sworn on oath deposes and says, that he is president of the Skinner and Eddy Corporation, a corporation organized and existing under the laws of the State of Washington, the petitioner herein named, and is authorized to make and verify the foregoing petition in behalf of said petitioner; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief, and that as to these matters, he believes them to be true.

D. E. SKINNER.

Subscribed and sworn to before me this 2nd day of January, A. D. 1924.

LINA HAMM,
*Notary Public in and for the
State of Washington,
Residing at Seattle.*

PETITIONER'S EXHIBIT A.

COURT OF CLAIMS OF THE UNITED STATES.

No. 34220.

(Decided April 4, 1921.)

COLLEGE POINT BOAT CORPORATION

vs.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

The plaintiff, the College Point Boat Corporation, is a corporation duly incorporated and existing under the laws of the State of New York.

II.

Under date of October 25, 1918, the plaintiff entered into a contract with the United States, represented by the Paymaster General of the Navy, to furnish the Navy Department, for a consideration of \$641,200, two thousand collision mats, such mats being a part of the equipment for ships, and intended for use in stopping leaks in a ship's hull resulting from collision or otherwise. A copy of said contract, including the specifications for the work, is annexed to the plaintiff's petition as Exhibit A, and is by this reference made a part of these findings of fact.

III.

Pursuant to said contract the plaintiff placed orders for about \$153,056.60 worth of the materials needed in the manufacture of said mats, and proceeded with a rearrangement and enlargement of its plant, which was necessary to the performance of its contract. In placing said orders for materials the plaintiff, where it could do so, reserved a right to cancel the orders in case its contract should be canceled by the Government.

IV.

The canvas to be used in making the mats was to be furnished by the defendants. On or about December 3, 1918, the plaintiff verbally requested the defendants to furnish the canvas, and defendants' officers thereupon promised to expedite the furnishing of it, but at the same time requested and arranged for a conference with the plaintiff, in the matter of the contract, to be held on December 6th following. At this conference the plaintiff was informed by defendants that on account of the signing of the armistice and the probable early termination of the war the mats called for by the contract would probably not be needed, and that the department therefore desired to negotiate for the cancellation of the contract. Also it was suggested by said officers that plaintiff stop operations for the performance of the contract and submit a proposition as to the basis upon which a cancellation of the contract would be satisfactory to it.

The said canvas for the mats was never furnished by the defendants, nor did the plaintiff gain request that it be furnished.

V.

Following said conference of December 6, 1918, and pursuant to defendants' said suggestion and request, the plaintiff stopped operations for the performance of said contract, and, under date of December 30, 1918, wrote the Navy Department as follows:

"Replying to your request as to on what basis we will accept cancellation or reduction in quantity of contract No. 42877 for 2,000 collision mats, aggregating \$641,200, we submit the following proposition for your approval:

"We appreciate that the desire of the Navy Department is to cancel the contract completely by mutual agreement, without expenditure for articles for which at the present time it has no need. We also wish it understood that the natural aim of the College Point Boat Corporation is to complete the entire contract which was entered into in good faith to supply a need of the Navy Department at the time. Particularly since it has not only allotted a considerable time of its plant and organization to this contract to the exclusion of other opportunities, but has also made all preparations and engagements for performance so that its expenditures and profits are not conjectural, but are practically liquidated. Between those two widely divergent views the settlement must be made upon the fairest and most equitable terms to both parties to the contract.

"Two ways to come to an agreement present themselves, and have been particularly mentioned by you. (1) What reduction in number will permit the College Point Boat Corporation to reduce subcontracts accordingly, realize expenditures already made, keep their plant busy until it can be filled with other work

and render possible making of a profit during the time now under contract equal to the profit which would have been realized by completing the entire amount contracted for. (2) To cancel as much as possible of the subcontracts for material, the Navy to accept at cost plus a reasonable charge for handling all materials now on hand, and to indemnify the College Point Boat Corporation by payment of liquidated damages covering expenditures made on account of the contract; and overhead and other expenses which must necessarily be made during the time for which the plant was retained for this contract; and which can not be allotted to anything else or otherwise recovered; and net profits which would have resulted from completion of the contract.

“Considering the first proposition, it can readily be seen that whatever reduction is made in the number of mats, the price remaining the same, the return per mat as well as the total return will be reduced since the overhead charges will be apportioned over a smaller number of mats. This would lead to the alternatives of either increasing the unit price with reduction in quantity, or increasing the separate damages with reduction in quantity at an unchanged unit price. We believe after our recent discussion of the subject that neither of these alternatives would be satisfactory to the Navy, since it feels that it does not require any mats, and would only accept a small number at an unchanged price, in order to keep the employees from being thrown out of work suddenly. There is the further possibility of taking other remunerative work after a stated portion of the contract has run out but a careful consideration shows no probability of any important gain from this source. The present capacity, created expressly for this contract, represents an

increase of about six times over the former sail loft, which was of the proper size to care for normal business requirements. Our competitors all have shops of about that size, which seems to prove that normal commercial conditions will not produce enough work to fill large shops operating on a manufacturing basis. With this contract on hand we were enabled to prepare for it on a manufacturing basis, but it is evident that commercial business can not furnish the work to fill it. Further, although proposals were opened by the Government for materials prior to the armistice, they have since been cancelled and apparently no new work is available from that source.

“This brings us to consideration of the second method, that of doing no further work and the obligations of the Navy being definitely evaluated and paid as liquidated damages for cancellation of contract.

“Assuming work to be stopped at the present time, no further shipments of raw materials made, subcontracts canceled, and materials now on hand taken over by the Navy at cost to us plus reasonable handling charges, there would still remain certain contract relations which if unfilled would represent a loss to the College Point Boat Corporation. The College Point Boat Corporation is in a position to fulfill the requirements of the contract, and certain overhead expenses would be borne by this contract and certain profits made as shown by schedule A. The Navy has virtually contracted for or leased certain output, which is the total output of the College Point Boat Corporation in this class of work, capacity having been expanded to six times its previous normal size for the express purpose of executing this contract. A decision made by the Navy at the present time that it does not require the output contracted for or the lease that it holds does

not release it from the obligations of a contract in which the other party has cared for its own obligations, stands ready to complete them, and its capacity being taken, has been prevented from entering into contracts with other customers. Therefore the Navy has either one of the two proper courses open—to continue with all the provisions of the contract, accepting deliveries of materials in accordance with it and making payments therefor, or to make such payments to the College Point Boat Corporation as will equal the expenses the corporation would have to bear, and the profit which would have arisen from the fulfillment of the contract.

“Since under the later course it may be said that contingencies might have arisen which would have affected the anticipated profit, certain allowance should be made in the form of a reserve for contingencies, which will guarantee the net profit stated. This can perhaps be best done by taking the cost of having the profit insured as a definite sum, against all contingencies, and the amount of the premium to be paid for such insurance deducted from the gross expected profit, giving a net profit which could not but have been made.

“Under this same course it will also be seen that certain overhead expenses will not occur at all if no work is done on the contract, while others will go on whether or not production continues. In schedule (1) the various overhead charges have been classified into these two groups, and it will be apparent that if no work is done the Navy can not be asked to be responsible for the expenses which were not incurred.

With the above two paragraphs in mind we may take figures from schedule A as follows:

9 by 9 mats:

Indirect overhead, $6.55 \times 1,000$ 6,550.00

Profit, $69,830 \times 1,000$ 69,830.00

12 by 12 mats:

Indirect overhead, $6.55 \times 1,000$ 6,550.00

Profit, $85,480 \times 1,000$ 85,480.00

Gross profit and incurred expense..... 168,410.00

Less quoted insurance premium 16,633.29

Net liquidated damages151,776.71

SCHEDULE A.

“Complete synopsis of estimated costs; based on prices contracted for materials, hand labor task with full bonus, estimated average riggers time, and overhead as per schedule 1. Overhead has been divided into direct costs, which would be eliminated if no work was done, and into indirect costs, which are unchanged by work not being done.

	9 by 9.	12 by 12
Labor, cutting	\$0.04	\$0.06
Machine sewing	1.11	1.53
Hand sewing	27.80	44.17
Rigging	3.20	3.20
Total labor	32.15	48.96
Total material	162.675	168.665
	194.825	217.625
Direct overhead	21.345	21.345
	226.170	238.970
Indirect overhead	6.550	6.550
	232.720	245.520
Profit	69,830	85,480
	302.55	331.00
Freight allowed	3.65	4.00
Contract price	306.20	335.00

"It will be seen by the schedule that profits are very carefully figured and are as nearly liquidated and known as anything in the future can be since the supplies of raw materials, the most uncertain item, are contracted for. The corporation feels that it is fully entitled to the entire profits stated, for the reason that it took the risk of making a less profit or none whatever when it made its bid and has since secured the profit by its own diligent and capable efforts. Attention is invited to the fact that the proposals on this contract were opened three several times and that this corporation was low at each opening, and at the final opening the next bidder was approximately \$120,000 above us, and the highest bidder \$400,000 above us, on the basis of the total quantity, so that by the foresight and courage of this corporation in taking the contract at a figure very much lower than any other bidder was willing to consider, a very great saving has already, and in any event, been made to the Navy Department. The department is respectfully invited to consider the situation on cancellation if the contract had been awarded elsewhere. Having voluntarily in the beginning accepted a much less profit than others might have had, we feel that we are entitled to retain that profit so far as it is a matter of certainty when the contract is liquidated or canceled.

"We submit therefore the only proposition which appears fair and equitable to both parties under the circumstances, namely, that the liquidated damages for cancellation of this contract be determined in the manner shown in the second preceding paragraph, and inasmuch as due to the short time available for making up these figures they are necessarily only approximate, we invite accurate confirmation by your representative of the exact cost figures from our records.

We feel, however, that the figures given are substantially correct, and would be willing to fix the liquidated damages at the figure stated above of \$151,776.71 in order to settle the question without further delay, subject, of course, to your approval.

"Attached to and forming part of the foregoing proposition is the following list of materials which have already been received from the subcontractors, and which we request the Navy Department to buy from us at cost to us plus reasonable handling charges to us of 2 per cent of their value. We are advised by the subcontractors that they will accept cancellation of the undelivered balance of our orders, therefore we will not have to ask the Navy to accept any responsibility for undelivered materials.

* * * * *

"From the foregoing list it will be seen that, owing to deliveries not having been made, we have a comparatively large amount of money to pay on this account in the immediate future, with no income from the contract to help us meet same, and request that if this meet with the favorable consideration of the Navy Department this amount be paid us on account without awaiting decision in the matter of liquidated damages."

VI.

On February 10, 1919, an agreement was entered into between the plaintiff and the defendants by which the defendants purchased and took over from plaintiff, at the cost thereof to plaintiff, \$44,066.07 worth of materials which had been purchased by and delivered to plaintiff for use in the performance of its said contract, on orders for which the plaintiff could not procure cancellation. A copy of said agreement is annexed to the plaintiff's petition as a part of Exhibit

A, and is by this reference thereto made a part of these findings of fact.

VII.

Under date of February 26, 1919, the Paymaster General of the Navy wrote the plaintiff as follows:

"Subject: Contract 42877; collision mats; regarding cancellation; adjustment.

"Sirs: By reason of the changed conditions of the country due to the signing of the armistice, the public interests demanded that cancellation be effected with respect to the material as called for under contract 42877, for the reason that the same were no longer needed by the Navy.

"Notice to discontinue all work under the contract and incur no further obligations was sent your company prior to any manufacturing work having been done on the collision mats as called for by the contract. The only work done under the contract has been the purchasing of the necessary material with which to prosecute the contract to completion. Some of this material had already arrived at your works, while other quantities were under commitment orders.

"The Navy has already agreed to take off your hands all material which could not be canceled from your subcontractors and to pay the invoice cost of this material to you; and, in fact, supplementary contract February 10, 1919, provided for the reimbursement to you in the sum of \$44,031.16, for the major part of the material; and the Navy also agrees to pay you the sum of \$10,231.80 covering the steel wire and steel rope purchased by you from the Hazard Manufacturing Co., cancellation of which subcontract could not be effected.

"From investigation at your plant it is also believed that the sum of \$1,900 is properly allowable for plant rearrangement, which rearrangement was made.

"In addition to the foregoing, be advised that the Navy does not feel that it can consider the item of your claim with respect to your estimated unearned profits, which is shown on your claim to be \$182,420.

"In the interests of an amicable adjustment of the whole matter, the Navy has proceeded with respect to this item on the basis of what would be considered a fair allowance of profit had the work proceeded under a Navy order, and it has been found that a profit allowance of \$32,120 would be a fair amount for the entire contract, as this sum would represent a return of 20 per cent on invested capital used over a production period of nine months.

"Considering the matter from this angle, and considering that the value of the material purchased is a certain per cent of the total cost of completion, it is proposed to allow you that per cent of \$32,120 as additional sum to the sums as previously mentioned.

"The ratio is about 12.06 per cent, and therefore 12.06 per cent of the profit allowance of \$32,120 would make \$3,873.67 properly allowable.

"By way of recapitulation, therefore, the Navy will allow the following:

Cost of material purchased	\$54,262.96
Reasonable handling charges thereon at 2 per cent	1,085.26
Allowance for plant rearrangement.....	1,900.00
Profit allowance on 12.06 per cent of total contract	3,873.67
Total.....	<hr/> \$61,121.89

"The foregoing is submitted after careful consideration of all the circumstances in the case, and is forwarded for your consideration prior to submitting the same to the Secretary of the Navy for approval.

"You are advised that no settlement is effective until the Secretary has so approved, but it is believed by those handling this matter that such a suggested settlement can reasonably be expected to receive approval."

VIII.

Under an agreement between the plaintiff and the defendants, of date June 30, 1919, the defendants purchased from the plaintiff, and subsequently paid for at cost to plaintiff, \$10,225.60 worth of additional material which had been purchased by plaintiff for the contract work on orders for which plaintiff could not procure cancellation. This material had not yet been shipped to plaintiff, and was therefore subsequently delivered by the manufacturer direct to the defendants, without being handled by the plaintiff. A copy of said agreement of June 30, 1919, is annexed to the plaintiff's petition as a part of Exhibit A, and is by this reference made a part of these findings of fact.

IX.

A reasonable allowance for the work and expense of purchasing the \$44,066.07 worth of materials purchased by and delivered to the plaintiff, as shown by Finding VI, is \$881.32; and a reasonable allowance for the work and expense of contracting for the remaining \$108,990.53 worth of the materials contracted for by the plaintiff, but not delivered to plaintiff, is \$1,089.90.

X.

Allowing for the contingencies and risk attendant upon a performance of the contract, and for the relief of the plaintiff from the risk, care and responsibility of performance, a reasonable allowance, upon the evidence, for profits on the plaintiff's said contract is the sum of \$115,000.

XI.

Prior to the negotiations for cancellation of said contract, and the suspension by plaintiff of operation thereunder, the plaintiff incurred an expense of \$1,900 in rearranging and enlarging its plant, exclusive of the cost of additional machinery; and also an expense of \$641.20 as premium on its contract bond. These expenses were necessary for and in connection with a performance of the contract, and were not necessary for the plaintiff's business outside of said contract.

A loss of \$600 was sustained by the plaintiff through depreciation of machinery purchased by it for performance of said contract, and which, by reason of the nonperformance of the contract, was not needed by it.

XII.

The plaintiff appears to have been willing to go on with the performance of the contract work. After the plaintiff's request of December 3, 1918, for the canvas which was to be furnished by the Government, no demand or request, either by the plaintiff or by the defendants, appears to have been made for the performance of the contract work; and no protest or complaint appears to have been made by either party on account of the suspension and nonperformance of the work.

XIII.

The plaintiff has received no payments from defendants on account of its said contract other than the payments to plaintiff for materials in accordance with the said agreements of February 10 and June 30, 1919, set forth in Findings VI and VIII.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of \$881.32 and \$1,089.90 shown by finding IX; \$15,000 shown by finding X; and \$1,900, \$641.20, and \$600 shown by finding XI, an aggregate of \$20,112.42. It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of \$20,112.42.

OPINION.

Booth, Judge, delivered the opinion of the court.

A collision mat, as its name imports, is a combination of various materials into the form of individual mats, as nearly impervious to water as possible, employed alongside the hull of vessels below the water line to prevent leakage in cases of collisions, etc. During the war with Germany the Navy Department sought to acquire large numbers of these mats. The plaintiff herein was a manufacturer of such articles, and in response to a public advertisement for bids for furnishing two thousand of the same submitted its bid and was awarded the contract. The contract, which was in writing, bore the date of October 25, 1918, and among other provisions specifically obligated the plaintiff to deliver ten mats within forty days from the

date thereof or receipt of canvas from the Government, and continue future deliveries at the rate of ten mats daily until the full number had been furnished. The defendant was to furnish the entire quantity of canvas used in their manufacture, the plaintiff to supply all other materials. The consideration passing to the plaintiff upon the completion of the contract was \$641,200.

The plaintiff immediately made ready to perform the contract. It purchased large quantities of material through subcontracts, enlarged its plant, and in various ways, as shown by the findings, exhibited commendable zeal in meeting its obligations under the contract. Up to December 3, 1918, no canvas had been furnished by the defendant, and none had been demanded by the plaintiff. On this date the plaintiff verbally requested the defendant to furnish the same, and were promised that its delivery would be expedited. At the same time, however, the defendant requested a conference with plaintiff looking toward an amicable arrangement for the cancellation of the entire contract. The signing of the armistice having intervened, the department no longer required or needed the mats, and requested the plaintiff to cease operations under the contract. The plaintiff did cease all operations thereunder, and on December 6, 1918, submitted a proposition in writing as a basis of settlement of respective contractual rights. This proposition we have set forth in finding V. On February 26, 1919, the defendant wrote the plaintiff setting forth in detail the items of damage it considered just and allowable, none of which is now contested save the item of profits. The counter proposition of the defendant included allowance in full for all materials purchased,

reasonable handling charges thereon, allowance for plant enlargement, and \$3,873.67 profits.

Prior to February 26, 1919—viz., on February 10, 1919—the parties had agreed by way of a supplementary contract on the payment for material on hand, the defendant acquiring the same by paying the cost price thereof, and this was followed by an additional supplementary contract on June 30, 1919, wherein the defendant took over additional material not covered by the previous supplementary contract, at the same time the plaintiff expressly reserving in writing the following alleged rights: "Saving, however, to the College Point Boat Corporation the right to pursue any remedy it may have in its own right, arising under contract 42877 or by reason of the terminating of the same, such rights arising not being connected with or growing out of the claims of any subcontractor * * *, all other conditions of the original contract No. 42877 to remain as originally specified."

The plaintiff now asserts a cause of action predicated upon the maintenance of contractual relations in virtue of the above reservations and a positive breach of the contract by the defendant in its failure to deliver the required canvas, this suit being for the recovery of \$189,693.09 alleged to be due as profits arising out of the contract. The defendant did not deliver any canvas and subsequently cancelled the contract. While the record does not show an express order of cancellation it sufficiently appears from the facts recited in the findings that subsequent to the signing of the armistice the defendant had absolutely no intention of furnishing any canvas for the completion of the mats, or to permit the plaintiff to perform the contract. The written record furnishes ample proof

of the fact that the defendant conceded the allowance of profits as part of plaintiff's damages. All the negotiations with reference to cancellation mentioned profits, the plaintiff claiming and the defendant conceding their allowance. The failure to consummate an agreement with reference to profits was due entirely to the inability of the parties to agree upon an amount. The breach of the contract by the defendant is obvious. Where one party to an agreement declines to perform a condition upon which performance of the contract by the opposite party depends, the party injured has his remedy, as clearly stated in *United States v. Speed*, 8 Wall., 77. So when the negotiations with respect to cancellation of the contract failed to culminate in a definite agreement with respect thereto, and the final result of the same was nothing more than two supplemental agreements covering the acquisition by the defendant of the plaintiff's materials, purchased by it to perform the contract, this fact alone was sufficient notice to the plaintiff, especially so in view of plaintiff's reservations in the last agreement, that the defendant did not and would not accept the mats or otherwise perform its obligations under the contract. It was in effect, if not in name, a cancellation of the contract and operated to give the plaintiff a cause of action for a breach of the same. *Mt. Holly Mining Co. v. Caraleigh Phosphate Works*, 72 Fed., 244.

To sustain its contention the plaintiff contents itself to rest upon proof of what the performance of the contract would have cost it, subtracts this amount from the consideration mentioned in the same, and insists that the difference, viz, \$189,693.09 measures its profits. The testimony adduced to sustain the various items of cost of performance consists of detailed estimates of

the cost and quantity of innumerable items of material entering into the manufacture of the mats, to which is added various items of overhead expenses, both direct and indirect, and the estimated cost of labor incident thereto. The plaintiff never made, and of course never delivered, a single one of the mats mentioned. It did enter into subcontracts for some of the material, all of which, except those mentioned in the two supplementary contracts, were canceled without loss to the plaintiff. It never employed the additional labor mentioned, and, with the exception of the items hereafter to be mentioned, did not in a single instance suffer a monetary loss by these reasons alone because of the cancellation of the contract. It is apparent, therefore, that the conclusion reached as to ultimate cost of the performance of the contract is indisputably conjectural and uncertain. To test its accuracy we must assume the continued existence of certain conditions. We can with precision account for various items of loss, but to say that the definite amount of gain claimed herein is the exact difference between those various items of cost, added to a long list of estimates, in a case where the contract had not proceeded to the point of demonstration, because no work had been done whatever, involves the abject acceptance of mere estimates, depending for their probative force upon various and uncertain contingencies. We do not mean to say that the evidence offered should be entirely rejected; on the contrary, it is to be received and considered by the court in connection with the additional and apparent facts that the plaintiff was relieved from all the risks of the performance of its agreement. Its plant and other resources were released from the burdens of the contract, its time and

opportunity thrown open to the acceptance of other work, all of which was, to say the least, of some advantage to the company. We cannot say with positiveness that the plaintiff would have met the obligations of its contract in every minute particular. The contract contained various provisions of much strictness, it imposed liquidated damages for failure to deliver promptly; it provided rigid rights of inspection; it required the contractor to give preference to this contract over all others; it protected the defendants against the infringement of patents; and in many other ways imposed obligations upon the contractor of such a nature that relief therefrom is necessarily an item to be considered in arriving at the amount of damages the company suffered because of the breach. While the defendant is in no position to contend that the plaintiff would not have fully performed its contract it allowed to proceed, that fact does not preclude the court from taking into account the relief mentioned in assessing damages for the breach. We are alone concerned, with rights accruing by reason of the breach, and awarding damages according to the law governing the relative situation of the parties subsequent to the breach. The case is similar to *United States v. Speed*, *supra*. *Broadbent Portable Laundry Corporation v. United States*, No. 34656, decided March 7, 1921.

Profits to be recoverable at all must not be remote or speculative. The proof with respect thereto must bring them within the rule of reasonable certainty, as shown by the long line of authorities cited in plaintiff's brief. This is not the case where a contractor has laid out and expended large sums of money in the performance of his contract and partially performed the same.

Even if it were, there is nothing in the decisions cited which militates against the rule announced in the *Speed case, supra*. As said by the court in the *Broadbent case, supra*: "In the application of the principles laid down there is always difficulty; each case must be determined by its own circumstances." In the trial of this case the court follows the rule long established, awards the plaintiff damages for all its reasonable expenditures and profits it would have earned, assessed according to the principles discussed.

The plaintiff had at the time of the cancellation of its contract the total sum of \$61,121.89 actually invested in the performance of the same. Almost immediately thereafter the defendants paid in cash for materials on hand, etc., \$54,291.67, thus reducing its actual cash outlay to \$6,830.22. If the rule of damages insisted upon is to prevail it is obvious that upon a very nominal outlay the plaintiff recovers damages of large proportions, *i. e.*, \$189,693.09, a fact which we think again emphasizes the contingencies inherent in the probable fulfillment of the contract in every particular, as well as the naturally speculative character of the final amount of profit accruing in the event of performance. Taking into account all the testimony in the record with reference thereto we believe plaintiff is entitled to \$15,000 profits.

The plaintiff rearranged and enlarged its plant for the exclusive purpose of performing this contract. The proof shows it to have cost \$1,900, an amount clearly allowable. An expense of \$641.20 was incurred as premium paid for its contract bond. This, too, is allowable.

The plaintiff purchased a quantity of new machinery

to meet the emergencies of this particular contract. It did not otherwise require the machinery, and suffered a proven loss of \$600 depreciation thereon. This item will be included in the damages awarded.

The plaintiff purchased and had delivered to it \$44,066.07 worth of materials. In acquiring and handling said materials it is entitled to a reasonable charge. This could not be done free of expense and the defendants conceded in their proffered offer of settlement two (2) per cent of the amount would be reasonable. This, amounting to \$881.32, we think allowable. In addition to this, the plaintiff had outstanding subcontracts for material amounting to \$108,990.53. All save one of these contracts were cancelled by the plaintiff and the material was not delivered, and hence not handled, but the expense incident to its purchase had been incurred and should be allowed. It was evidently not so expensive as the item above, and a reasonable allowance therefore would, in our opinion, be 1 per centum of the total amount, or \$1,089.90.

Judgment will be awarded plaintiff in the sum of \$20,112.42. It is so ordered.

Hay, Judge; Downey, Judge; and Campbell, Chief Justice, concur.

Dissenting opinion by Judge Graham.

PETITIONER'S EXHIBIT "B."
IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

No. 7617.

MEMORANDUM DECISION.

(Filed Nov. 23rd, 1923.)

On Defendant's Motion to Quash Service of Summons.

PUGET SOUND MACHINERY DEPOT, A CORPORATION,
Plaintiff,

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET
CORPORATION, A CORPORATION, *Defendant.*

No. 7695.

SKINNER & EDDY CORPORATION, A CORPORATION,
Plaintiff,

v.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET
CORPORATION, A CORPORATION, *Defendant.*

BRONSON, ROBINSON & JONES,
Attys. for Plaintiff in Case No. 7617.

MACCORMAC SNOW, CHAS. E. ALLEN, CLARENCE L.
REAMES AND O. P. M. BROWN,
Attys. for Defendant.

HASTINGS & STEDMAN, AND DONWORTH, TODD & HIGGINS,
Attys. for Plaintiff in Case No. 7695.

MACCORMAC SNOW, CHAS. E. ALLEN, CLARENCE L.
REAMES AND O. P. M. BROWN,
Attys. for Defendant.

CUSHMAN (D. J.)

The two above entitled causes were tried together.
In each the plaintiff sued upon contract in the state

court. The defendant removed both causes to this court. The defendant appears specially and moves to quash the service of summons and dismiss, upon the ground that the defendant is not doing business in this state, and was not at the time of service of summons; and upon the further ground that the persons served were not qualified under the law to accept service.

It is contended upon the part of the plaintiff in each suit that defendant has entered a general appearance and cannot now be heard on the motion to quash. Owing to the conclusion reached upon the merits of defendant's motions to quash, it is not necessary to determine whether defendant appeared generally, prior to filing its "special Appearance."

In the one suit there is no record of the return of service of summons; but it appears from the affidavits that in both cases service was made upon A. R. Lintner, acting Director Agent and Manager of defendant. This service was sufficient to confer jurisdiction, providing the defendant was, in fact, doing business in the district at the time of such service.

Defendant's main contention is that it can only be sued in the District of Columbia, where it was incorporated; that it has not been doing business in this state; that such business as it does or has done, in the State of Washington, was as agent of the United States, and not for its own private gain or advantage.

The affidavits show that offices were rented and occupied by the defendant in the City of Seattle; that in making rental arrangements the lessor was not informed that defendant was securing the lease other than as principal. It is shown that the defendant kept in its name deposits in Seattle banks upon which

it, through one of its officers resident in Seattle, drew checks for the purchase of supplies in Seattle; that since the service of process in this cause the form of check given by the defendant has been changed by adding after the words "United States Shipping Board Emergency Fleet Corporation" the word "Agent."

At the time of service, and prior thereto, on the streets in the City of Tacoma street cars were operated bearing the designation "United States Shipping Board Emergency Fleet Corporation, owner"; that the cars were operated by the City of Tacoma under a conditional sale contract; that between ports in this district and Asiatic ports a line of steamships was and is being operated under the Merchant Marine Act of 1920; that the company selling the passenger and freight service thereon is the Admiralty Oriental Line. In its literature it is described as "Managing agents, United States Shipping Board Emergency Fleet Corporation." It is so described in the forms of its bills of lading and passenger tariffs.

Concerning the operation of these vessels, defendant has filed the affidavit of Joseph E. Sheeday, Vice-President of the United States Shipping Board Emergency Fleet Corporation, in charge of the operations of the corporation. In his affidavit, among other things, he says:

"That pursuant to the power and authority conferred upon the United States Shipping Board Emergency Fleet Corporation by law and by said resolution of September 30, 1921, passed and adopted by the United States Shipping Board, and to carry out the will and intent of Congress as set forth in Section 12 of said Merchant Marine

Act, 1920, the Corporation did, on November 1, 1922, acting for and upon behalf of the United States of America, as represented by the United States Shipping Board and not upon its own behalf or in connection with any business from which defendant corporation could or would derive any pecuniary gain and benefit, execute a certain contract and agency agreement with Admiral Oriental Line, a corporation, whereby provision was made for the operation by the said Admiral Oriental Line for the United States Shipping Board of vessels of the United States. * * *

"That pursuant to the provisions of said Agency contract and amendments thereto with said Admiral Oriental Line, certain ships owned by the United States of America and controlled by the United States Shipping Board have been operated, into and from the Port of Seattle and other ports, for the United States, by the said Admiral Oriental Line, under the supervision and oversight of the defendant Corporation, acting for the United States of America, pursuant to the power and authority vested in the defendant corporation by law and by the Board resolution of September 30, 1921, hereinabove referred to, and the five passenger ships, mentioned in the affidavit of T. B. Owen, filed in this Cause, were at the time of service of process in this case and are now, and have been since November 1, 1922, some of the ships so operated by the Admiral Oriental Line for the United States of America."

It further appears that defendant was, at the time of service of process, occupying the land constituting the Skinner & Eddy Ship Building Plant No. 2, at Seattle, and that from the concentration yard upon such property it sold, and offered for sale, materials stored in said yard.

Defendant has here contracted in its own name, for

the repair and equipment of ships in this district.

The nature of the defendant's activities are concisely stated in the resolution of the Shipping Board of September 30, 1921. The pertinent parts of this resolution are as follows:

“Resolved, That the power and authority vested in the Shipping Board by the merchant marine act, 1920, shall, until otherwise ordered by the board, be exercised by it through the United States Shipping Board Emergency Fleet Corporation in the following matters, and to the extent and in the manner hereinafter provided:

(1) The operation, maintenance, repair, and reconditioning of vessels provided that no established line shall be discontinued for new line established, or allocation of passenger vessels made, without the approval of the United States Shipping Board.

(2) The completion or conclusion of any construction work upon vessels which has heretofore been begun or has been authorized by the United States Shipping Board.

(3) The sale of vessels (except to aliens) at such prices and on such terms and conditions as the United States Shipping Board may prescribe.

(4) The operation and sale of housing projects, real estate, railroad and other similar property, subject to confirmation by the United States Shipping Board before any final contract of sale is made.

(5) The operation and sale of dry docks; all sales to be subject to such terms and prices as may be established by the United States Shipping Board.

(6) The custody and sale of all other property and materials.

(7) All accounting for the United States Shipping Board Emergency Fleet Corporation.

(8) Insurance and matters pertaining to the same.

(9) The operation of all piers and pier facilities; provided that no pier or pier facilities shall be leased without prior authorization from the United States Shipping Board.

(10) The leasing and rental of offices, Warehouses, docks, and storage facilities.

(11) All matters incidental to any of the foregoing, including the execution of contracts, charters, bills of sale, leases, deeds, and other instruments necessary or convenient to the exercise of the power and authority hereby conferred upon the United States Shipping Board Emergency Fleet Corporation; and be it further * * *."

Without going further into details of the various business transactions covered by the affidavits, it is clearly shown that the defendant is doing in this district a very substantial part of such business or transactions as it is authorized to do; or; in fact, anywhere does.

While the exact point in controversy does not appear to have been decided, it is clearly implied from the decision of the Supreme Court of the United States, in Sloan Shipyards Corporation *et al*, v. United States Shipping Board Emergency Fleet Corporation and the United States, 258 U. S. Rep., 549, that defendant is suable in this district. Other cases tending to support this conclusion are: Bank of United States v. Planters' Bank, U. S. Sup Ct. Rep., 9 Wheaton, 904; United States v. Strang *et al*, 254 U. S. Rep., 491; The Lake Monroe, 250 U. S. Rep., 246; United States v. Matthews *et ux*, 282 Fed. 266 (9 C. C. A.); King County, Wash., *et al*. v. United States Shipping Board Emergency Fleet Corporation, 282

Fed. 950 (9 C. C. A.); United States Shipping Board Emergency Fleet Corporation *v.* Banque Russo Asiatique, London, 286 Fed. 918; Lord & Burnham Co. *v.* United States Shipping Board Emergency Fleet Corporation, 265 Fed. 955; Gould Coupler Co., *v.* United States Shipping Board Emergency Fleet Corporation, 261 Fed. 716; Buffalo Union Furnace Co., *v.* United States Shipping Board Emergency Fleet Corporation, 291 Fed. 23.

In the United States of America *v.* Roy W. Walter, October term 1923, No. 20, the Supreme Court says:

“The United States can protect its property by criminal laws, and its constitutional power would not be affected if it saw fit to create a corporation of its own for purposes of the Government under laws emanating directly or indirectly from itself, and turned its property over to its creature. The creator would not be subordinated to its own machinery.”

No intention is shown by the foregoing language to narrow in any way the scope of the holding in Sloan Shipyards Corporation *v.* United States Shipping Board Emergency Fleet Corporation. In the instant case, as in the Sloan Shipyards case, the court is determining: not the question of the Government's power but of its intent, as shown by congressional enactments. Congress doubtless could provide that suits, such as the present, could only be brought in the Court of Claims. The Director General of Railroads, with powers not dissimilar in principle to those of the Shipping Board, made orders as to the venue of suits against himself, and such orders were upheld by the courts in a number of decisions meet-

ing the approval of the Supreme Court. *Missouri Pacific Railroad Company et al, v. Ault*, 256 U. S. Rep., 554 at 561, Note.1.

The fact that the plaintiff Skinner & Eddy Corporation may have a suit pending in the Court of Claims to recover upon the same cause of action is of no consequence upon this motion. If the two suits cannot be maintained at the same time, defendant's remedy is a motion to compel the plaintiff to elect in which court it will proceed.

Motions to quash, dismiss and to amend appearance, denied.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF WASHINGTON, } ss:

I, F. M. Harshberger, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original Memorandum Decision, filed November 23, 1923, in the foregoing entitled cause, now on file and of record in my office at Seattle and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said Court,
this 2nd day of January, 1924.

F. M. HARSHBERGER, *Clerk.*

(SEAL)

By S. E. LEITCH, *Deputy.*

PETITIONER'S EXHIBIT "C."

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

AT LAW No. 7695.

JOURNAL ENTRY.

SKINNER & EDDY CORPORATION, A CORPORATION,
Plaintiff,

vs.

UNITED STATES SHIPPING BOARD EMERGENCY FLEET
CORPORATION, A CORPORATION, *Defendant.*

This cause having heretofore come on to be heard upon the motion of defendant to quash the service of summons in this action, and to dismiss the complaint and to amend the præcipe for appearance heretofore entered herein by the defendant, and the Court, being duly advised in the premises as more particularly appears by its memorandum decision filed herein on the 23rd day of November, 1923,

It is here and now ORDERED and ADJUDGED that defendant's motion to quash the service of summons be, and it hereby is, denied; that the defendant's motion to dismiss this action for lack of jurisdiction be, and it hereby is, denied; that the defendant's motion to amend the præcipe for appearance filed herein be, and it hereby is denied.

To each and all of which said rulings defendant excepts and its exception is allowed.

The defendant may have 30 days in which to answer or otherwise plead to the complaint.

Done in open court this 27th day of November, 1923.

EDWARD E. CUSHMAN,

Judge.

Endorsed; Filed in the United States District Court,
Western District of Washington, Northern Division,
November 27, 1923.

F. M. HARSHBERGER,

Clerk.

By

S. E. LEITCH,

Deputy.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF WASHINGTON, } ss:

I, F. M. Harshberger, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that I have compared the foregoing copy with the original Journal entry in the foregoing entitled cause, now on file and of record in my office at Seattle and that the same is a true and perfect transcript of said original and of the whole thereof.

Witness my hand and the seal of said Court,
this 2nd day of January, 1924.

F. M. HARSHBERGER, *Clerk.*

(SEAL)

By S. E. LEITCH, *Deputy.*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1923.

ORIGINAL.

In the Matter of the Application of SKINNER & EDDY
CORPORATION, Petitioner, for a writ of mandamus
or prohibition to the Honorable the United States
Court of Claims.

BRIEF ACCOMPANYING PETITION

STATEMENT.

The facts are fully stated in the petition, but for the convenience of the court, the circumstances leading up to this application will be restated here as concisely as possible.

On April 4, 1921, the Court of Claims held, in the case of Coliege Point Boat Corporation *vs.* United States, that the Government was liable for anticipated profits for the cancellation of a contract made and

canceled by the Navy Department after the Act of June 15, 1917. A copy of this opinion, while never officially reported, appears as Exhibit "A" to the petition.

Prior to the decision of the Supreme Court in the case of Sloan Shipyard Corporation and Astoria Marine Iron Works *vs.* United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549 (decided May 1, 1922), it had been generally held by the Federal Courts that contracts made by the Fleet Corporation were contracts of the United States.

With the aforementioned decisions as a guide, the petitioner, on June 15, 1921, filed suit against the United States in the United States Court of Claims, praying for judgment in the sum of \$17,493,488.97. By far the greater portion of this amount was for anticipated profits arising out of the cancellation of certain lump sum contracts between the United States Shipping Board Emergency Fleet Corporation and petitioner for the construction of ships. Another large part of petitioner's claim was for items which, in a suit against the United States, were in reality claims for just compensation.

After petitioner's suit had been filed, the Court of Claims withdrew its opinion in the College Point Boat Corporation case, and reached an entirely contrary view to this decision in the Meyer Scale and Hardware Company case (57 Ct. Cl. 26) and the Russell Motor Car Company case (57 Ct. Cl. 464); that is, in the last two mentioned cases it held that the Government had the right under the Act of June 15, 1917 (40 Stat. L., 183), to cancel its own contracts, and in such case the other party to the contract could not recover anticipated profits. The decision in the Russell Motor case, on appeal to the United States Supreme Court, was affirmed, on April 9, 1923. This case not only de-

cided that anticipated profits for cancellation of such Government contracts could not be recovered, but also held that the remedy was for just compensation in the manner provided in the Act of June 15, 1917, which Act required the amount of just compensation to be determined by the President before suit filed. In the petitioner's case this determination of just compensation was not made until more than a year and a half after the filing of the suit in the Court of Claims. The Supreme Court had previously held in the Astoria Marine Iron Works Case (258 U. S. 549) (decided after suit was filed by petitioner in the Court of Claims) that suit would properly lie against the Fleet Corporation under a contract substantially similar in form to the contracts upon which petitioner had sued in the Court of Claims.

In the light of the above-mentioned decisions rendered after suit was filed by petitioner, it was obvious that petitioner had misconceived its remedy in two vital respects, first, under the Astoria decision the suit was properly against the Fleet Corporation and not against the United States, and, second, even if properly against the United States, petitioner could not, under the Russell Motor case, recover in the suit filed either anticipated profits or just compensation, and therefore, as will hereinafter appear, could not make any recovery at all. Accordingly, on April 11, 1923 (two days after the decision of the Supreme Court in the Russell Motor Car Company case), it moved to dismiss its action in the Court of Claims, at the same time attempting to file with the Clerk of said Court a *praecipe* dismissing the action. At this time no plea or counter-claim had been filed by the Government, but a general traverse had been entered by the Clerk under Rule 34 of that Court, and there had been no

other proceedings of any kind nor had any testimony been taken. A copy of petitioner's motion was served on the Government's Attorney and the next day after the motion was filed, the Government's Attorney filed a motion to withdraw the general traverse and to file a counter-claim, no reason for not having previously filed it being assigned, although the case had been pending for nearly two years.

Both motions were argued orally to the Court, and on April 30, 1923, the Court made its order granting petitioner's motion to dismiss, thus effectually denying the Government's motion.

On the day following, petitioner filed suit in the State Court at Seattle, Washington, against the Fleet Corporation for \$9,129,401.14, basing its suit on the same contracts as had been previously sued upon in the Court of Claims,—practically the only difference in the two suits being that no claim was made in the suit against the Fleet Corporation for anticipated profits. This suit was transferred, on application of the Fleet Corporation, to the Federal Court, and a motion was made to quash the service of summons therein. This motion was denied by the Court and the Fleet Corporation is now required to answer that suit.

On the 9th of June, 1923, forty days after the Court of Claims had granted the petitioner's motion to dismiss, and thirty-nine days after suit had been filed in the State Court at Seattle, Wash., the Government filed its petition in the Court of Claims to set aside the order of dismissal, basing its motion, ostensibly, on the fact that at the hearing of the motion to dismiss, petitioner had suppressed the fact that its claim had been previously filed with the Auditor for the State and other Departments (a fact which had been known to the Fleet Corporation's attorneys for over two years)

and that at the oral hearing the inference to be drawn from the argument of petitioner's counsel was that petitioner intended to file another suit in the Court of Claims, which it had not done,—two wholly immaterial grounds! The real gravamen of the petition, however, as must appear from reading it (see Exhibit D—Volume II, page 7), was that petitioner had filed another suit for the same cause of action against the Fleet Corporation in another Court. This petition was argued to the Court and on October 22, 1923, it filed an order again denying the Government's motion to set aside the order of dismissal, but on the following day this order was set aside, on the Court's own motion, and after further argument an order was entered on November 28, 1923, setting aside the order of dismissal and allowing the Government to file its alleged counter-claim. This counter-claim was filed on December 1, 1923, and petitioner will be compelled to answer it unless the writ herein prayed for be granted.

On February 14, 1923, long after suit had been filed by the petitioner in the Court of Claims, the Shipping Board determined the amount of just compensation to which the petitioner was entitled by reason of the cancellation of its contracts to be \$3,130,433.46, but no credit for this nor for any other amount is given by the Government in its counter-claim.

On January 7, 1924, after the petition attached to the motion filed herein was printed and verified, a motion to dismiss was filed by the United States Shipping Board Emergency Fleet Corporation in the suit pending at Seattle, a copy of which said motion is filed herewith as Exhibit "E," and which shows that one of the objects of the motion to set aside the order of dismissal in the Court of Claims was to compel petitioner to dismiss its suit at Seattle.

POINT I.**The Petitioner, the Skinner and Eddy Corporation,
Had the Right to Dismiss Its Suit.**

There seems to be an almost unbroken line of authorities holding that the plaintiff in a suit has an absolute right to discontinue or dismiss his suit at any stage of the proceedings prior to verdict or judgment, as the case may be, unless *prior to the filing* of the motion to dismiss or discontinue the suit a counter-claim has been filed and even *after* a counter-claim has been filed, under circumstances similar to those shown in the case at bar.

Veazie *v.* Wadleigh, 11 Peters 54.

Confiscation Cases, 7 Wallace 454. (See page 457 of the opinion.)

Barrett *v.* Virginian Railway Company, 250 U. S. 473.

In this latter case this court said (page 476 of the opinion):

“At the common law, as generally understood and applied, a nonsuit could be taken freely at any time before verdict if not indeed before judgment. The right is substantial.” (Citing cases.)

In *City of Detroit v. Detroit City Railway Company*, 55 Fed. 569, the Circuit Court of Appeals for that Circuit, through Judge Taft, reviews the cases and uses the following language:

“It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without pre-

judice, on payment of costs, was of course except in certain cases. *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 3 Sup. Ct. Rep. 594. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind."

A few of the other cases on the same point are:

- Cowham v. McNider*, 261 Fed. 714.
- McCabe v. Southern Railway Co.*, 107 Fed. 213;
- Youtsey v. Hoffman*, 108 Fed. 699;
- United States ex rel Goffman v. Norfolk & W. Ry. Co.*, 118 Fed. 554;
- Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co.*, 121 Fed. 1015;
- Morton Trust Co. v. Keith*, 150 Fed. 606;
- Thomson-Houston Electric Co. v. Holland*, 160 Fed. 763.

Petitioner's case is similar in facts and identical in principle with the case of *McGowan et al. vs. Columbia River Packers Association et al.*, 245 U. S. 352. In that case, the plaintiff had filed his suit in the United States District Court for the State of Washington, upon the assumption that the land at a certain point underneath the Columbia River was within the State of Washington. The defendant had answered, and also filed a counter-claim. After this counter-claim was filed, the Supreme Court of the United States, in another case, rendered a decision, which held that this particular land was not within the State of Washington, but was within the State of Oregon, thus depriving the District Court for the State of Washington of jurisdiction over the land in controversy, although it still had jurisdiction over the parties. The plaintiff, therefore, after this decision was

rendered, moved to dismiss his case. The motion was denied by the lower court. The case was tried and a judgment had in favor of the defendant upon its counter-claim. This decision was reversed by the Circuit Court of Appeals on the ground that the motion to dismiss should have been granted, and upon appeal to the Supreme Court, the Circuit Court of Appeals was upheld. The Supreme Court held that inasmuch as the plaintiff could not possibly recover in the suit what he had anticipated at the time he filed the suit, and had been put in an unexpected position, he had a right to dismiss the case, notwithstanding the fact that a counter-claim had been already filed.

The parallel between this case and the petitioner's in the court of Claims is striking. When petitioner filed its suit in the Court of Claims, so far as there had been any decision on the questions involved, it had been held (a) by the Court of Claims in the College Point Boat case (Exhibit "A" to petition) that anticipated profits could be recovered in cases against the United States similar to petitioner's; and (b) it had been held by the Federal Courts, with but few exceptions, that contracts of the Fleet Corporation were contracts of the United States. With these decisions to guide it, the petitioner sued the Government on the Fleet Corporation's contracts, assuming that they were Government contracts, and not only claimed anticipated profits, but claimed other items which in a suit against the United States, as the law is now firmly established, were properly claims for "just compensation" (such as the item of \$906,416.26 claimed as loss on materials purchased for cancelled ships—see Exhibit D—Volume I, page 11) upon which suit could only be brought after a determination as provided by the Acts of Congress.

After suit was filed, not only did the Court of Claims reverse its former decision in the College Point Boat case (see *Meyer Scale Co. v. United States*, 57 Ct. Cls. 26, and *Russell Motor Car Co. v. United States*, 57 Ct. Cls. 464, the latter affirmed by this Court in 261 U. S. 514) but the Supreme Court of the United States, in the cases of *Sloan Shipyard Corporation* and the *Astoria Marine Iron Works* (particularly the latter) *v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549, established the law to be that under contracts with the Fleet Corporation similar to the Skinner and Eddy Corporation contracts, suit would properly lie against the Fleet Corporation.

The net amount for which judgment had been claimed in the Court of Claims was \$17,493,488.97. As the amount claimed by the petitioner in that suit as anticipated profits (Exhibit D, Volume I, page 11), together with the items which in a suit against the United States would properly be claims for just compensation, were more than the net amount claimed by plaintiff, it was obvious that if plaintiff could recover neither one of these items in the suit filed, then it could recover nothing at all in that suit.

Since the decision of this court in the *Russell Motor* case, made on April 9, 1923, 261 U. S. 514, it is settled law that in actions of this character anticipated profits cannot be recovered. This same case also settled the law that the act of June 15, 1917 (40 Stat. L. 183), gave the President, or his nominee, power to cancel Government contracts, and the decision further points out that where there is such cancellation of a Government contract the only remedy is for just compensation in the manner provided by the statute. The part of the statute with regard to just compensation is as follows:

"Whenever the United States shall cancel, modify, suspend, or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof or any ship, charter, or material, in accordance with the provision hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

It is well established that when the Government provides a remedy against itself, the procedure outlined is exclusive (*United States vs. Babcock*, 250 U. S. 328), and such procedure must be followed literally; *Rock Island A. & L. Co. v. United States*, 254 U. S. 141.

It follows, therefore, that to entitle a claimant to sue the Government for just compensation for the cancellation of contracts such as those involved here, such just compensation must have been determined by the President (now by the Shipping Board—see statute of June 5, 1920, 41 Stat. L. 989) prior to filing suit therefor. The record here shows that no determination of just compensation was made until February 14, 1923 (see Exhibit D, Volume II, page 11), or nearly two years after the petition was filed in the Court of Claims. It follows then that at the time the petition was filed, no cause of action existed as to just compensation, and this defect could not be corrected by amendment, be-

cause no amendment could change the fact that at the time the suit was brought no cause of action existed. (American Bonding and Trust Co. v. Gibson Company, 145 Fed. 871.) It necessarily follows, therefore, that in the suit filed in the Court of Claims against the Government the petitioner could not possibly have recovered either anticipated profits or just compensation, and that therefore its whole suit must have failed, because, from petitioner's own statement in the petition itself, it affirmatively appears that if the items of anticipated profits and just compensation are eliminated, there would have been a balance in favor of the Government, and therefore petitioner could have made no recovery at all.

The decision of this court in the Russell Motor case, made on April 9, 1923, caused the petitioner to realize that it had mistaken its remedy and that it could not possibly recover any affirmative judgment in the case it had filed. It therefore, two days after the Russell Motor decision, filed its motion to dismiss in the Court of Claims, and at the same time filed, or attempted to file, a *praecipe* for dismissal, this latter document being refused acceptance by the Clerk.

It was exactly so in the McGowan case, where the plaintiff, after the decision of the Supreme Court, found he could not recover what he had set out to recover, and therefore filed his motion to dismiss, which motion the Supreme Court held should have been allowed, notwithstanding the fact that a counter-claim was already on file. The McGowan case is therefore authority for holding in the present case that even if the Government had filed its counter-claim prior to the motion to dismiss, that nevertheless the motion to dismiss ought to have been granted. How much stronger is the right to dismiss when at the time the

motion was made no counter-claim had been filed or offered.

POINT II.

Petition is Barred from Proceeding in Court of Claims by Reason of Section 154 of the Judicial Code.

Section 154 of the Judicial Code (36 Stat. L. 1138) is as follows:

“Sec. 154. No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect of which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediate or immediately, under the authority of the United States.”

It is apparent that this statute effectually prevents petitioner from prosecuting the case in the Court of Claims for the reason that it has filed suit against the Fleet Corporation to recover on a large number of the same items that are set forth in the petition in the Court of Claims. This course of procedure is apparently the correct procedure on contracts of this character, as is evident by the cases hereinafter cited.

That this Section is a matter of jurisdiction, and therefore deprives the Court of Claims of the power to proceed with the case, is obvious from the nature of the powers given that Court. The Government of the United States is not liable to be sued except with its consent, and whatever limitations Congress places upon that consent limits the court's jurisdiction to the full extent of such limitations.

In the case of the United States vs. Waddell, 172 U. S. 48, it was held that the six-year statute of limitations against the United States was jurisdictional.

In *Finn vs. United States*, 123 U. S. 227, the matter is argued at some length by the Court. In that case a suit was brought upon a claim barred by the six-year statute. The Court said (page 231 of the Opinion):

"We are of opinion that the claim here in suit—although by reason of its character 'cognizable by the Court of Claims'—cannot properly be made the basis of a judgment in that court. As the United States are not liable to be sued, except with their consent, it was competent for Congress to limit their liability, in that respect, to specified causes of action, brought within a prescribed period. * * * The duty of the court, under such circumstances, whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States."

And finally the Court held that since the Government of the United States has assented to a judgment being rendered against it only in certain classes of cases, that any limitation upon the cases in which judgment could be rendered against it was a condition or qualification of the right to a judgment, and therefore extended to the powers of the court itself.

It is, therefore, certain that if the petitioner had asked the Court of Claims to reinstate the suit at the time the Government asked for such reinstatement, that the Court would have had no power to have made such order, and it must necessarily be true therefore that the Court had no power to make such order on the motion of the Government, and its order restoring

the case was an assumption of a power or jurisdiction which it did not possess. Moreover, the petitioner cannot appeal either from the order nor from a final judgment in the case, should one be rendered, because it is prohibited from doing so by this same Section of the Judicial Code.

See also *Corona Coal Co. vs. United States*, decided by this Court January 7, 1924.

As petitioner cannot appeal either from the order nor from a judgment, it has therefore no remedy against the order complained of other than the writ prayed for in the petition herein.

POINT III.

Government's Offered Counter-Claim Was Too Late, Under the Rules of the Court of Claims

The Rules of the Court of Claims provide:

Rule 29. "Demurrers and pleas must be filed within sixty days after the filing of the petition, unless the court extend the time."

Rule 34. "Unless the Attorney General shall, within sixty days after the service of the petition upon him, appear and defend by filing a demurrer, plea, or answer, and by filing a notice of any counter-claim, set-off, claim of damages, demand, or defense in the premises, a general traverse of the petition shall be considered as entered on the part of the defendants, and the case shall be proceeded with the same as though an answer of general traverse had been filed."

Where rules of court are not inconsistent with positive law, they have the same effect as law.

United States v. Barber Lumber Co., *et al.*, 169 Fed. 184;

United States v. Freeman, 59 U. S. 30;

United States v. Pacheco, 63 U. S. 225;

United States v. Gozez, 64 U. S. 326.

In petitioner's case, notwithstanding the rules above quoted, the Government did not file its counter-claim, or offer to file it, until approximately twenty-two months after the petition had been filed. In its application to file a counter-claim at such a late date no excuse was given or even suggested as to why the counter-claim had not been offered within the proper time. While the Court of Claims could have undoubtedly set aside its rules upon a proper showing being made, such rules could not be ignored unless some adequate reason was given therefor, and particularly is this true when the counter-claim has not only not been offered within the time required by the rules, but is not offered at all until petitioner has moved to dismiss his case.

POINT IV.

Counter-Claim by Government Can Only be Allowed Against a Claimant Against the Government.

Section 145 of the Judicial Code (36 Stat. L. 1137) provides as follows:

"Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters: * * *

"Second: All setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States *against any claimant against the Government in said Court.* * * *"
(Italics ours.)

The language is perfectly plain. When a claimant moves for dismissal of a cause, he is no longer a claimant against the Government in said court, and there is therefore no longer any jurisdiction in the court to receive, hear or determine any such counter-claim.

The Constitution of the United States guarantees to its citizens the right to trial by jury in lawsuit involving claims of a legal nature. All statutes in any way limiting or qualifying such right must receive such reasonably strict construction as will give full effect to the constitutional guaranty. It is undoubtedly true that any claimant who comes into the Court of Claims and avails himself of the privilege of suing the Government, thereby waives the right to a jury trial on any claim which the Government may set up against him. But when a petitioner dismisses his claim prior to the assertion of the Government of any counter-claim, he ceases to be a claimant.

The notice to dismiss was notice to the court and to the Government that petitioner was no longer a claimant; that it claimed nothing in said suit.

The Court of Claims is not a court of general jurisdiction but a special statutory court. There are, therefore, no general presumptions in its favor in regard to jurisdiction. Undoubtedly the statute creating the court and defining its powers and jurisdiction is to receive a reasonable construction so as to reasonably carry out the purpose which Congress must have had in mind in creating the court. That purpose, however, is not to be lost sight of. That purpose was to create a court where the citizen may sue the Government. The primary, and practically the only purpose of the act is to afford to the citizen a tribunal where he may assert causes of action against the Government as to which without such court he would be remediless. This, as

stated, is the only real object of creating the court. The section giving to the Government the right to file a setoff is purely a dependent and subordinate clause intended to be defensive only and never offensive. It is a shield for the Government and not a sword. To hold, therefore, that the Government may sue in the Court of Claims a citizen who has taken the proper steps to get out of the court, and is no longer the wager therein of a claim against the Government, would be to give the Court by judicial construction, a purpose and a power contrary to the obvious meaning of the act which Congress must have had in mind in establishing such a Court.

When plaintiff filed its motion to dismiss its petition, and when this motion to dismiss was granted, and when the petitioner followed this dismissal by commencing a new suit against the Fleet Corporation, thus putting it out of its power to file or prosecute a claim against the United States, it ceased as effectually as possible to be a claimant against the United States. There can be no more effectual manner of ceasing to be a claimant than this, and to permit the Government now to file a counter-claim and to compel the petitioner to answer that counter-claim in the Court of Claims, is in effect, permitting the Government to file an absolutely new action against the petitioner in the Court of Claims, and to prosecute that action when the petitioner is barred from presenting its own case, even as to \$3,130,433.46 which the Shipping Board allowed as just compensation.

POINT V.**Contracts Sued Upon Are With Fleet Corporation and Not with United States; Therefore Case Was Never Properly in Court of Claims.**

In the Sloan and Astoria cases, 258 U. S. 549, it was held by this court that contracts such as these are with the Fleet Corporation and not with the United States. On page 568 of the Opinion the Court said:

“We attach no importance to the fact that the second contract, alleged to have been illegally extorted, was made with the Fleet Corporation ‘representing the United States of America.’ The Fleet Corporation was the contractor, even if the added words had any secondary effect.”

Again on page 569:

“The whole frame of the instrument seems to us plainly to recognize the Corporation as the immediate party to the contract.”

Since this decision of this Court there have been many decisions of the lower United States Courts to the same effect.

In the case of the United States v. Matthews, 282 Fed. 266, the Circuit Court of Appeals for the Ninth Circuit held that a cause of action such as is attempted to be set up in the counter-claim here, is in favor of the Fleet Corporation and not in favor of the United States, and sustained a demurrer to a complaint by the United States on that ground, citing the Astoria case as its authority.

In the decision rendered April 16, 1923, in the case of the United States vs. Wood, *et al.*, 290 Fed. 109, the

Circuit Court of Appeals for the Second Circuit used the following language (p. 115):

“We can not, however, conclude this opinion without stating our conviction that the theory upon which the bill was filed is wholly erroneous and that the debt herein involved is not in law a debt due to the United States, and that the complaint does not state a cause of action. The debt set forth in the complaint is one due, not to the United States, but to the Fleet Corporation as principal and independent contractor.”

In the case of *John G. Wright & Company vs. United States Shipping Board Emergency Fleet Corporation*, 285 Fed. 647, Judge Hand said:

“This argument does not I think sufficiently regard the fact that the action is not against the United States but against the Fleet Corporation.”

See also the following cases:

Atlantic Corporation v. United States Shipping Board Emergency Fleet Corporation, 286 Fed. 222.

United States Shipping Board Emergency Fleet Corporation v. Banque Russo Asiatique, 286 Fed. 918.

There are many provisions in the contracts between Skinner and Eddy Corporation and the United States Shipping Board Emergency Fleet Corporation which indicate more strongly than the contracts in the cases above cited that these contracts are contracts with the Fleet Corporation and not contracts with the United States.

A good part of plaintiff's claim as well as the alleged set-off the Government has filed grew out of correspondence in which the Fleet Corporation did not even purport to be representing the United States.

On May 11, 1918, the Fleet Corporation wrote a letter to petitioner (see page 236 of Volume I, Exhibit D), which letter is a contract by reason of the fact that it is accepted and signed by the petitioner, in which the Fleet Corporation undertakes to lease and sell to petitioner under certain terms and conditions set forth in the letter, a certain shipyard which it had just purchased under a letter of May 10, 1918 (page 239 Vol. I, Exhibit D.)

It is significant that the contract of May 11, 1918, does not mention the United States at all. The Fleet Corporation does not say that it is acting for the United States. The contract is written apparently for the Fleet Corporation alone, and it must have been with the Fleet Corporation, as a corporation, because at that time it had no Governmental authority either to lease or to sell the plant as it undertook to do. Neither the Fleet Corporation nor the Shipping Board were given any authority to sell or lease real estate belonging to the United States until the Act of June 5, 1920. Of course, as a corporation, with all the general powers of any corporation, it had full authority to lease and to sell this plant. The lease itself (see page 459 of Exhibit D, Volume 1), does purport to have been made by the Fleet Corporation, "representing the United States of America." In this respect it is similar to the Astoria contract, but nowhere else in the lease is there anything to indicate that it is not a lease of the Fleet Corporation instead of the United States. In fact, when it is considered that the Fleet Corporation had no Congressional authority to make this lease, the conclusion is inevitable that the lease was a lease of the Fleet Corporation itself, and not a lease of the United States.

It is fundamental that agencies of the Government

can not dispose of Government property except in accordance with some act of Congress.

This contract of May 11, 1918, is the foundation of by far the larger part of the dealings between the Fleet Corporation and this claimant. It provides for the Construction of fifty ships at a contract price of almost \$100,000,000.00, and it was contracts for some of these same ships which were afterwards cancelled, and which gave rise to a large portion of plaintiff's claim. This contract is an indivisible contract. Without the contract to lease and sell the shipyard, the petitioner could not have undertaken to build the ships, because a large number of the ships were to be built in the yard so agreed to be leased and sold. It was part of the consideration for building the ships that the shipyard itself was to be sold to petitioner, and it is obvious that the petitioner could not have undertaken to build these ships at all without the rest of the contract for the leasing and sale of the shipyard. It then follows that as the Fleet Corporation, representing the Government, had no authority to either lease or sell this yard, it must have been acting for itself and in its own corporate capacity, and not as a representative of the Government, when it made this contract. Either this contract, involving the purchase of a \$4,000,000.00 shipyard and the construction of almost \$100,000,000 worth of ships, is a contract of the Fleet Corporation, or else it is absolutely void for lack of authority to execute it.

We therefore urge that these contracts are with the Fleet Corporation and not with the United States, and therefore the Court of Claims has no jurisdiction over either the original petition or the counter-claim filed by the Government.

POINT VI.**Wrongful Order of Court Deprived Petitioner of Its Right to Trial by Jury, and Writ Asked Is Proper Remedy for This Wrong.**

The only possible object in reinstating the case after once dismissing it is to allow the Government to file and prosecute its affirmative action against petitioner in the Court of Claims, and thus deprive petitioner of its right to trial by jury.

The Government could, of course, at any time file suit in the United States Courts other than the Court of Claims, and have it determined in such action whether the petitioner was or was not indebted to the Government in the amount claimed, or in any other amount, but on that issue and in that case the petitioner would have a right to trial by jury.

In the Matter of Simons, 247 U. S. 231, where the lower court had transferred a certain cause from the law side of the court to the equity side of the court, thus depriving the appellant of the right to trial by jury, the court said:

“If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake”;

and the writ was granted requiring the lower court to restore the cause to the law side.

In *Ex Parte Peterson*, 253 U. S. 300, the lower court had appointed an auditor with instructions to make an investigation as to the facts, hear the witnesses, ex-

amine the accounts, and make a report. The plaintiff therein applied to the Supreme Court for a writ of mandamus and/or prohibition commanding the lower court to proceed with the trial in the regular way, and that it be prohibited from proceeding under the order. The Supreme Court said, page 305 of the Opinion:

"It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in *Ex Parte Simons*, 247 U. S. 231, 239, 'be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by' a proceeding 'that ultimately must be held to have been required under a mistake.' "

The Court then held that the order did not deprive plaintiff of his right to trial by jury, and therefore denied the writ.

In this case, as the order complained of was a wrongful order which deprived petitioner of its right to trial by jury, it should be dealt with by this Court now. It would be a great hardship if the plaintiff should be compelled in the Court of Claims to defend against the Government's suit, going through months, and perhaps years, of taking testimony of innumerable witnesses, and long, complicated, and voluminous accounts examined and put in evidence, and then find that all this labor had been for naught because of the wrong-

ful order of the court in reinstating the cause to permit the Government to file a counter-claim seven months after the original cause had been dismissed.

CONCLUSION.

We have, we think, shown:

First: That petitioner had a right to dismiss its case in the Court of Claims;

Second: That after the Court had dismissed said case it had no power to reinstate it, being prohibited by Section 154 of the Judicial Code;

Third: That the only effect of the order is to permit the Government to sue petitioner affirmatively in the Court of Claims and compel petitioner to defend against said claim while petitioner is barred from presenting its own case;

Fourth: That the contracts are with the Fleet Corporation and not with the United States, and therefore not cognizable in Court of Claims;

Fifth: That petitioner cannot appeal either from the order or from a final judgment in the case on account of Section 154 of the Judicial Code, and therefore has no other remedy but the writ prayed for;

Sixth: That, in any event, the order was wrong and deprived petitioner of the right to trial by jury on the Government's affirmative case.

It is respectfully submitted that the writ as prayed for should be issued.

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In the Supreme Court of the United States.

OCTOBER TERM, 1929.

25
ORIGINAL.

IN THE MATTER OF SKINNER & EDDY
CORPORATION, PETITIONER.

BRIEF FOR THE UNITED STATES IN OPPOSITION
TO MOTION FOR LEAVE TO FILE PETITION FOR
WRIT OF HABEAS CORPUS, ETC.

JAMES M. BRICE,
Solicitor General.

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